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No. 85-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

UNITED STATES OF AMERICA,
Respondent,

v.

WILLIAM H. PFLAUMER,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Did not the court of appeals disobey the teachings of *United States v. Bagley* when it failed to take a flexible approach in evaluating the harm to the defendant caused by the government's deliberate failure to turn over an immunity agreement with a significant government witness since the court of appeals did not consider that: (a) defendant had specifically requested this information before trial; (b) if the defendant had obtained this immunity agreement, he would have significantly changed his trial strategy towards this witness, whom even the government has conceded was "significant;" and (c) a change in approach towards this witness would have fit perfectly with defendant's overall trial strategy.

2. Did not the court of appeals err when it failed to place the risk of nonpersuasion upon the government where the government erroneously and deliberately refused to turn over materials specifically requested by defense counsel?

3. Where the court of appeals reverses a conspiracy conviction because the jury was improperly allowed to find defendant was a conspirator simply because he engaged in a cover-up months after the conspiracy and its substantive crimes were completed, and the jury had been invited to convict defendant of the substantive crimes vicariously once it found him to be a member of the conspiracy, must not the substantive convictions be reversed as well?

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OPINIONS BELOW

The memorandum and opinion of the district court (App. *infra* A1-A12) is unreported. The initial opinion of the court of appeals (App. *infra* A13-A67) is reported at 740 F.2d 1298. This Court's grant of the government's petition for certiorari and remand for further consideration in light of *United States v. Bagley*, 473 U.S. , 105 S. Ct. 3375 (1985), (App. *infra* A68) is reported at 473 U.S. , 105 S. Ct. 3550 (1985). The opinion of the court of appeals upon remand (App. *infra* A69-A116) is as yet unreported. An order amending the opinion of the court of appeals upon remand (App. *infra* A117-A118) is as yet unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1985. (A69). A petition for rehearing was denied on November 4, 1985. (A119). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Procedural Background

An indictment filed in the United States District Court for the Eastern District of Pennsylvania charged William H. Pflaumer, Charles Gillan, Harold Oxman and Raymond Hill with 21 counts of mail fraud, 18 U.S.C. § 1341, committed by means of falsified diesel fuel invoices intended to defraud the states of Pennsylvania, New Jersey and Maryland of diesel fuel excise taxes due from Wm. H.P., Inc. ("Wm. H.P."), a trucking company owned by Mr. Pflaumer. The 21 mailings listed in the first 21 counts of the indictment began in April, 1978 and ended in June, 1979. Count 22 of the indictment charged that from November, 1976 to January 31, 1981 the same four defendants plus John Luciano entered into a conspiracy in violation of 18 U.S.C. § 371 to commit the mail fraud described in the first 21 counts. Frank Jock was a named but not indicted participant in all 22 counts of the indictment.

Luciano pleaded guilty to the conspiracy count and testified as a government witness. Gillan pleaded guilty to all counts, but did not testify. The jury found Mr. Hill not guilty and Messrs. Pflaumer and Oxman guilty on all counts.

Petitioner filed motions for a new trial which were denied by the district court. (A1-A12). The district court was reversed by the United States Court of Appeals for the Third Circuit. (A13-A67).

This Court granted the government's petition for certiorari and, without briefing or argument, vacated the

judgment of the court of appeals and remanded for reconsideration in light of *United States v. Bagley*, 473 U.S. , 105 S. Ct. 3375 (1985). (A68). On remand, the court of appeals reinstated Mr. Pflaumer's conviction on the 21 counts of mail fraud and granted him a new trial on the conspiracy count. (A90).

B. **Trial**

Following the indictment counsel for petitioner, by written request, specifically asked the government to inform him of (1) any agreements, understandings or other promises made between the government and its witnesses, whether they related to this case or any other case or investigation, and (2) all evidence of criminality on the part of any witness for the government. The discovery letter instructed the government, where disclosure was declined, to state whether the government had information or materials responsive to the declined request so the district judge could resolve the issue.

The government responded by letter stating that (1) Messrs. Jock and Luciano were the only government witnesses with whom it had any agreement at all in *any* cases or investigations and (2) Jock and Luciano were the *only* government witnesses known by the government to have engaged in any criminal conduct.

Prior to trial, the court specifically ordered the government to turn over to the defense all *Brady* material. During the trial — when other information which should have been turned over came out on cross-examination — the court asked whether there was any more undisclosed *Brady* material, and was assured by government counsel that there was none.

In spite of these assurances, the only material petitioner ever received from the government with respect to its witness Ralph Wille was notes of an interview with Mr. Wille, which make no mention of any immunity agreement or any Wille exposure to criminal prosecution

in connection with another matter. Indeed, the statement creates the impression that Mr. Wille was simply an innocent bystander witness, voluntarily cooperating with the government. Mr. Wille was a crucial government witness at trial.

After the trial was over, the defense learned for the first time that Ralph Wille (1) had himself engaged in serious criminal conduct and was the subject of an ongoing federal grand jury investigation, (2) had secured a use-immunity agreement from government counsel for his testimony with regard to his own activities and those of Gillan and Pflaumer at the trucking company during the period about which he testified at trial, and (3) was still subject to the possibility of federal criminal prosecution when he testified at trial.[1]

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1. Counsel for Pflaumer learned for the first time after trial that:
   a. Wille was the architect of a $500,000 to $600,000 check-kiting scheme involving various bank officials, which was the subject of an ongoing federal Grand Jury investigation;
   b. Government counsel originally sought a guilty plea from Wille in connection with the check-kiting scheme;
   c. Defendant Pflaumer's name figured prominently among those under investigation in connection with the check-kiting scheme and it was clear to Wille that if he could supply incriminating information as to Pflaumer to the government, that Wille would get immunity for any criminal exposure that he had;
   d. On September 26, 1980, a use-immunity agreement (A-1529) (all citations to the Appendix submitted in the court of appeals begin with "A-") was entered into between the government and Ralph Wille providing Wille full use-immunity for any information and testimony provided by him "relative to the federal investigation into certain activities of Charles Gillan and others during the period between June 2, 1978 and December, 1979";
   e. It was clear from the beginning of the investigation and at the time the use-immunity letter was drawn that defendant Pflaumer was one of the "others" referred to in the letter agreement;

Existence of the scheme charged was merely background at trial. Counsel for Pflaumer acknowledged in his opening statement that the scheme existed and operated as alleged in the indictment and that the state taxes said to have been evaded — approximately $40,000 to $50,000 a year — were evaded. Pflaumer's defense was that he simply did not know of the scheme and that he had turned over the operation of the trucking company to Gillan.

Pflaumer promised to show that: 1) Frank Jock, the only witness who directly implicated him in the tax scheme, was not to be believed, and that Jock was able to get himself out of a long jail term by giving the government a case against Pflaumer, and 2) Pflaumer was unaware of how his trucking company's diesel fuel purchases and use were being reported to the states concerned, and that throughout the indictment period, he was an almost absentee owner who had turned over such matters and most others concerning the trucking company to Gillan, who became President of the trucking company when Pflaumer purchased and began to operate the Philadelphia brewery, C. Schmidt & Sons, Inc. ("Schmidt's") in April, 1976.

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f. By the terms of the Wille immunity agreement, the information and testimony provided by Wille could nevertheless be "used against him in the event the Government chooses to proceed criminally against him" if:
   1. Wille does not provide "complete cooperation and testimony at any hearings and/or trials"; or
   2. ". . . the totality of circumstances convinces the Government that (Wille's) statement is not complete and truthful. . ."; or
   3. The government discovers that Wille received any benefit from the activities under investigation other than salary and reasonable and customary benefits related to his employment (A-1529 to A-1531);

g. At the time Wille testified in this case, the grand jury investigation of the check-kiting scheme remained an open and ongoing grand jury investigation, wherein Wille was still subject to the possibility of prosecution.

The government's case against Pflaumer broke down into two time frames: 1) pre-June, 1979 or before the last mailing alleged in the indictment to form the basis for the mail fraud counts; and 2) post-June, 1979 — evidence relating primarily to contacts with Pflaumer during the state tax audits by state auditors. These contacts were after the last mailing alleged in the indictment and were admissible only to show awareness of the acts occurring before the last mailing.

Thus, there were two critical issues at trial: what did Pflaumer know and, if he did know about the scheme, when did he first learn of it. It was petitioner's position throughout the trial that, since the conspiracy as charged ended with the last mailing, if the jury found Pflaumer only learned of the scheme after the last mailing and during the fuel audits, he must be acquitted of *all* charges.

Only one witness provided significant evidence establishing Pflaumer's involvement in the scheme before the last mailing in June, 1979. Frank Jock testified that he attended a single meeting at which the scheme was approved by Pflaumer in late 1976. The government conceded that Jock was not a credible witness and invited the jury to look elsewhere for corroboration.[2]

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2. The court of appeals concluded that the government's skepticism was well-founded for cross-examination established

> "that the prosecution had orchestrated Jock's transfer to Eglin prison camp, a minimum security prison— characterized by Jock as 'a country club,' . . . — obtained a reduction in sentence making Jock eligible for parole immediately, . . . and recommended favorable treatment from the Parole Board, which Jock received. . . . As a consequence, Jock — who had at that time served only five months of a four-year prison term for wire fraud — was released on parole after only three additional months' incarceration, two of which Jock served 'at a half-way house in Palm Beach.' . . . The import of Jock's cross-examination was that the government had paid dearly for his testimony." (A49-A50).

The government sought to corroborate Jock's testimony (and undermine Pflaumer's defense as articulated in Pflaumer's opening) by offering evidence of Pflaumer's daily involvement in the affairs of Wm. H.P. so that the jury might infer that Pflaumer must have known of the openly operated scheme. Although a number of Wm. H.P. employees testified during the trial, Wille was the only one who testified that Pflaumer was significantly involved in the affairs of the trucking company. Contrary to Pflaumer's position, "the government [through Wille] established that Wm. H.P. issued no checks without Pflaumer's approval and that Pflaumer conferred several times daily with the Wm. H.P. office manager. In contrast, Pflaumer's defense was that Gillan and Hill ran Wm. H.P., while he spent most of his time at the [Schmidt's] brewery and had little involvement in the day to day financial affairs of Wm. H.P." (A51).

Furthermore, the government established through Wille that there appeared to be no secret at the trucking company about the excise tax scheme. In short, Wille was the only witness to cut directly through Pflaumer's defense that Pflaumer was an almost absentee owner of the trucking company who left its daily affairs to others and knew nothing of the tax scheme.

The fact that Wille was presented as an innocent, former employee of the trucking company, with no animosity towards Pflaumer and no reason or motive for testifying as he did, made his testimony more credible — particularly when contrasted to the testimony of John Luciano and Jock who bought their freedom through their testimony against Pflaumer. If the Wille agreement had not been suppressed, Wille would have been seen for what he was, another prosecution witness working his way to freedom by implicating Pflaumer.

A second part of the proof presented against Pflaumer consisted of the testimony of fuel tax auditors from Pennsylvania, New Jersey and Maryland. Each of the audits described took place after the last mailing

(June 30, 1979). The auditors testified that in response to a request made to petitioner for all fuel invoices, they received only a fraction of the invoices he produced later in response to a federal grand jury subpoena. From this, the prosecutor argued that Pflaumer was aware of the fuel tax scheme and tried to cover it up by hiding the mismarked invoices. This evidence was admissible only to show consciousness of guilt, and not participation in an ongoing crime, for all of the crimes charged had already been committed and completed.

To ensure that the jury focused on the two questions necessary to determine whether Pflaumer was guilty or not guilty — what did he know and when did he know it — counsel for Pflaumer requested the judge to charge the jury as follows:

> "The indictment charges that the last tax return mailed as part of the alleged scheme and conspiracy was dated June 30, 1979. It was at that time, therefore, that the alleged conspiracy or scheme terminated. You may not find any defendant guilty merely on the basis of anything he did or said after June, 1979. This is because a conspirator cannot join a conspiracy or scheme after its attempts to achieve illicit objectives [have] ended. . . .You have heard testimony of state auditors about their dealings with Mr. Pflaumer's companies after June, 1979. If you find that Mr. Pflaumer only became aware of the alleged conspiracy or scheme to defraud Pennsylvania, New Jersey and Maryland of diesel fuel taxes at the time of these audits, *you must acquit Mr. Pflaumer of all charges*. In short, if you find that the government has not proved beyond a reasonable doubt that Mr. Pflaumer knowingly and willfully became a member of the alleged conspiracy or scheme to defraud Pennsylvania, New Jersey and Maryland of diesel fuel taxes

> prior to June, 1979, *you must acquit Mr. Pflaumer of all charges.*" (A86) (emphasis added).

The district court rejected defendant's request to so charge.

C. **The Third Circuit's First Opinion**

The United States Court of Appeals for the Third Circuit reversed Pflaumer's conviction on two grounds. A panel majority of Judges Gibbons and Mencer concluded:

> "Because the trial court erred in rejecting Pflaumer's request for a charge that the jury must find that he joined the conspiracy prior to the last mailing, *and* because the government withheld specifically requested *Brady* material, his conviction must be reversed, and the case remanded for a new trial." (A59) (emphasis added).

Judge Sloviter dissented and refused to reach the jury charge issue because it had never been the subject of oral argument. (A66).

The United States petitioned for certiorari but did so only with respect to the second reason — the *Brady* issue. This Court granted the petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded for "further consideration in light of *United States v. Bagley*, 473 U.S. (1985)." (A68).

D. **The Third Circuit's Second Opinion**

In the first opinion, Judges Gibbons and Mencer, after a thorough analysis of the trial record, had concluded that Pflaumer was entitled to a new trial because they were not convinced beyond a reasonable doubt that the trial's outcome would have been the same absent the

government's suppression of evidence. On remand, however, a new panel majority consisting of Judges Sloviter and Mencer analyzed the trial record differently before applying the *Bagley* formula and concluded that Pflaumer was no longer entitled to a new trial on the suppression ground.[3]

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3. Both Circuit majority opinions agree (1) that Wille was the *only* witness who testified that Pflaumer played an active role in the day-to-day financial affairs of the trucking company — so active that no check could be issued without his personal knowledge — and (2) that this testimony permitted the jury to find that Pflaumer had to have known of the openly operated fuel tax scheme and participated in it, and (3) that Wille's testimony rebutted the principal defense upon which Pflaumer relied, and (4) that there was no impeaching cross-examination of Wille. (A51-A53, A56-A57, A81-A82). The two opinions divide sharply over the importance of Wille, and the strength of the rest of the government's case.

According to the original opinion of Judges Gibbons and Mencer:

> "Pflaumer's impeachment of Frank Jock invited the jury to seek corroboration from other witnesses. Wille was one such corroborating witness, and — in light of the weakness of the corroborating testimony of Michael Jock, Cordua, and Luciano — an important one." (A57).

Further, had the jury known of Wille's suppressed immunity agreement, it "might well have been influenced by the fact that the principal witnesses who incriminated Pflaumer all were the beneficiaries of prosecutorial largess." (A57).

According to the present opinion of Judges Sloviter and Mencer, Wille was "by no means as important to the prosecution as was the more direct incriminating testimony of other witnesses." (A82). The new majority also suggests that Wille's testimony was largely supported by that of Delores Lyons and Robert Gould, each of whom worked at the trucking company and testified to discussions with Pflaumer about "the financial end" of the trucking business. But neither supported the inference which flowed from Wille's testimony — that Pflaumer was so active in the affairs of the trucking company that he had to be aware of the openly operated tax scheme. Most importantly, on cross-examination, Lyons explained that Pflaumer would involve himself only in raising operating funds, and Gould explained that he saw Pflaumer infrequently.

Judges Gibbons and Mencer also parted ways from Judges Sloviter and Mencer over the strength of the government's case.

Turning then to the error in the jury instruction, the new majority agreed it was "bound by the [original] majority's holding" (A87), but then proceeded to reinterpret that holding as ordering a new trial only on the conspiracy count (count 22) and not the 21 substantive mail fraud counts — despite the fact that the conjunctive reference to both grounds for reversal, coupled with the reversal of Pflaumer's conviction on all counts, makes plain that both errors afforded independent grounds for reversal on all counts. (A59). It is important to note the further fact that Judge Gibbons who drafted the original majority opinion, but dissented here, has said that he intended reversal on all counts for each of the independent grounds. (A96). Finding that the 21 substantive counts were not tainted by the jury instruction error which reversed the conspiracy conviction, the new majority affirmed the convictions on counts 1 through 21 — the only counts on which the three-year prison sentence had been imposed. Judge Gibbons, dissenting, would have ordered a new trial on all counts on each of the independent grounds.

After an in-depth analysis of the entire trial record, the original majority found that the government had "not" presented an "overwhelming" case. In fact, they found it too weak to eliminate the "reasonable likelihood" that the jury's conviction of Pflaumer may have been based solely on the postcrime evidence that he concealed the tax fraud scheme when state agencies later audited the trucking company, and upon that finding the original majority held the jury instruction error to be prejudicial. (A29-A30). While the new panel majority agrees that it is bound by the holding, it ignores the finding on which it was based and misdescribes the evidence as "substantial." (A82, A87).

REASONS FOR GRANTING THE WRIT

This case presents the Court with an opportunity to decide two critical questions left undecided by a majority of this Court in *United States v. Bagley*, 473 U.S. , 105 S. Ct. 3375 (1985). In *Bagley*, this Court held that one standard was sufficient to evaluate whether a defendant was entitled to a new trial where the government deliberately refused to provide exculpatory or impeachment material to a defendant in response to a specific request, a general request, or no request at all. However, the Court specifically left open the question of how to apply that standard when a specific request is made, as contrasted with a general request, or no request at all. In this case, on remand for reconsideration in light of *Bagley*, the majority opinion of the court of appeals failed to consider at all that: (1) the immunity agreement which was withheld by the government had been specifically requested by the defendant before and during trial, and (2) if defense counsel had obtained this hidden immunity agreement before trial, he would have dramatically changed his approach to Wille, a witness even the government has conceded was significant.

The second issue left unresolved by *Bagley*, and unmentioned by the panel majority of the Third Circuit, was upon whom should the risk of nonpersuasion fall. This is a crucial issue since in many *Brady* cases, deciding what might have been is pure speculation. As a consequence, placement of the risk of nonpersuasion will often be determinative of the result.

Finally, the court of appeals majority ignored binding precedents of this Court when it reversed the conspiracy conviction because of a "reasonable likelihood" that defendant was found to be a conspirator simply because he engaged in a cover-up after the conspiracy had ended, but upheld the substantive convictions despite the fact that as instructed the jury may have convicted

defendant of the substantive offenses because as a conspirator defendant was responsible for what his fellow conspirators had done.

1a. In *United States v. Bagley*, this Court formulated a new standard for determining whether the government's suppression of exculpatory or impeachment evidence in a particular case requires a new trial. Under *Bagley*, a new trial must be awarded only where "there is a reasonable probability that, had the evidence been disclosed to the defendants, the result of the proceedings would have been different." *Id.* at 3383 (Opinion of Blackmun, J.). *See also id.* (Opinion of White, J., concurring in part and concurring in the judgment). Justice Blackmun's opinion further defined " 'a reasonable probability' as 'a probability sufficient to undermine confidence in the outcome.' " *Id. (quoting Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 2068 (1984), which also held that a "reasonable probability" standard is different from and lower than a "more likely than not standard." *Id.*).

The *Bagley* Court noted, in defending the use of one standard for all cases, *i.e.*, specific, general and no request cases, that the government's failure to respond to a specific request affirmatively misrepresents that the evidence requested does not exist, and that this misrepresentation may result in the defense abandoning "lines of independent investigation, defenses or trial strategies that it otherwise would have pursued." 105 S. Ct. at 3383. For that reason, Justice Blackmun said:

> "The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defendants and the trial would have taken had the defense not been misled by the prosecutor's incomplete response." *Id.*

In an opinion concurring with the judgment and concurring in part, Justice White, joined by the Chief Justice and Justice Rehnquist, wrote that he agreed with the standard of reasonable likelihood, but saw no reason for Justice Blackmun "to elaborate on the relevance to the inquiry of the specificity of the defendant's request for disclosure." *Id.* at 3385.

Thus, while *Bagley* set one standard by which to measure the prosecutor's failure to turn over exculpatory or impeachment material, it stated that the standard must be flexible and the reviewing court must consider the difficulty inherent in retrospective speculation in determining whether the standard has been met. In short, *Bagley* fixed the standard; but the factors to be evaluated in deciding whether this standard has been met and the weight to be placed upon these factors, were left undecided by a majority of the Court. *See id.* at 3385.

b. The court of appeals' analysis demonstrates a complete misapplication of *Bagley*. Rather than using the flexible analysis dictated by *Bagley*, the court of appeals ignored the factors emphasized by *Bagley* and used a wooden approach to reverse its earlier position.

First, the court of appeals failed to place any weight *whatsoever* upon the fact that the defendant had specifically requested the government to produce any agreements with its witnesses, and the government deliberately chose to hide its immunity agreement with the witness Wille.

For purposes of *Bagley*, a specific pretrial request is important because it shows what defense counsel thinks is important to defending that case *before* trial. The specificity of the request is also significant, as Justice Blackmun noted, because the government's negative answer implies that the material requested does not exist. This implication may mislead defense counsel into abandoning certain avenues of investigation, attack or cross-examination — exactly what happened here.

c. The court of appeals also never considered the fact that knowledge of Wille's prior criminal involvement and immunity agreement with the government would have completely changed the defense's approach to Wille. As Judge Gibbons noted, Wille, as presented at trial, was the "only significant unimpeached witness" in the case. (A114) (Gibbons, J., dissenting). With this plea agreement in hand, counsel for Pflaumer would have vigorously attacked Wille as another witness who had bought his freedom by implicating Pflaumer and thereby assisting the government in weaving a web custom-made for Pflaumer. With the immunity agreement in hand, counsel for Pflaumer would have argued even more effectively that this case amounted to a government vendetta against Pflaumer, in which it was willing to pay anything to anybody for testimony incriminating Pflaumer.

The benefit of the Wille immunity agreement to the defense was that it would not only undercut the testimony of Wille (and thus assist Pflaumer in establishing the first prong of his defense — he was not involved with the company), but would also undermine the credibility of the entire prosecution (and thus assist him in the second prong of his defense — this case was a government vendetta). It is exactly such a retrospective view which worried the Court in *Bagley* — particularly in a close case such as this.

After an in-depth analysis of the entire trial record, the original panel majority found that the government had "not" presented an "overwhelming" case. In fact, they found it too weak to eliminate the "reasonable likelihood" that the jury's conviction of Pflaumer may have been based solely on the post-crime evidence that he concealed the tax fraud scheme when state agencies later audited the trucking company, and upon that finding the original majority held the jury instruction error to be prejudicial. (A29-A30). While the new panel majority agreed that it was bound by that holding, it ignored the

finding on which it was based and misdescribed the evidence as "substantial." (A82). Indeed, the difference between this fact description in the first and second opinion demonstrates in starkest fashion what a close case this was.

Rather than evincing the awareness required by *Bagley*, the court of appeals evidenced its misunderstanding when it relied for its decision upon the fact that Pflaumer's counsel had used the testimony of Wille in his closing argument (to support the fact that Gillan masterminded this scheme). (A83). There is nothing noteworthy about a lawyer's focusing on the pluses in a witness's testimony, rather than the minuses. In fact, this effort to neutralize Wille's testimony was a direct result of the government's suppression, which deprived counsel of the means to discredit this important government witness.

The court of appeals then multiplied its error by relying on the fact that the government did not emphasize Wille's testimony in its closing. This is meaningless. Wille's testimony spoke for itself. Furthermore, looking to the government's reliance on the witness in its closing argument invites the government to play the exact type of game condemned by courts of appeal around the country. An unscrupulous prosecutor, in a close case such as this, may well be tempted to withhold exculpatory evidence and then merely let the testimony of the witness speak for itself without specifically relying upon it in closing argument. *Bagley* never intended to create such an opportunity to orchestrate materiality.

d. Rather than considering the specificity of defendant's request and evaluating defense counsel's change in trial strategy and the impact of that change, the court of appeals gave deference to a district court judge's conclusion, which the original opinion had characterized as neither thorough nor reasonable. *Compare* A57 *with* A81-A82. The district court judge concluded:

> "In determining whether information is material, courts 'have framed the test in terms of that which is reasonably likely to have changed the jury's judgment.' *United States v. McCrane*, 527 F.2d 906, 911 (3d Cir. 1975). In other words, if the testimony of the witness who would have been impeached by suppressed information is merely corroborative, the information withheld by the government was not material and need not have been turned over to the defense under *Brady*." (A11).

Assuming *arguendo* that "reasonably likely" is the equivalent of "reasonable probability," the district judge's explanation makes plain that merely mouthing the right formula does not mean the correct standard has been applied.

Impeachment of a corroborative witness may make the critical difference at trial. Indeed, where the government itself opens and closes to the jury by conceding that it would not ask the jury to convict on the testimony of Frank Jock alone, and Jock was the only witness in the entire case to directly implicate Pflaumer, the government's case really depends upon the corroboration. To imply that a corroborative witness may never meet the *Bagley* standard ignores completely the flexibility of review emphasized in Justice Blackmun's opinion.

e. Finally, unless the specificity of the request is a factor to be considered when the government fails to turn over *Brady* material, government counsel will have no incentive to respond to specific requests from defense counsel. Prosecutors will just turn over what *they* think is material. Indeed, one must wonder how the prosecutor is even in a position to determine materiality given the fact that he may not even know what the defense is going

to be.[4] In short, since the prosecution may not know the theory of defense and, therefore may not know what is "material" exculpatory or impeachment information, a specific request must be considered as a distinctive factor in determining materiality. That is why the *Agurs* court stated the government's failure to respond to a specific request from defense counsel is "seldom, if ever, excusable." *United States v. Agurs*, 427 U.S. 97, 106 (1976).

In sum, the specificity of defendant's request does not alter the standard by which the defendant's fair trial is measured, but it is a factor to be evaluated in determining whether that standard has been met. It must be evaluated because it shows what defense counsel considered important to the defense before trial. In this case, the court of appeals erred because it failed to evaluate the importance of the specific request and how the government's untrue answer to that request altered defense counsel's strategy. If this Court allows the court of appeals' analysis to stand, then the flexible approach promised in *Bagley* is an empty promise indeed.

2. The second question left open by *Bagley* requires the Court to determine upon whom the risk of nonpersuasion falls. In other words, must the government show that no other outcome was reasonably likely, or must the defendant show that, if the withheld information had been available, a different outcome was reasonably likely. The burden of nonpersuasion is critically important in cases where a court is forced to divine what may have been. As noted by Judge Gibbons:

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4. It is ironic that in criminal cases, which involve people's lives, a deliberate failure to respond to a specific request can go unnoticed, while in a civil case, involving only money, a similar failure may in fact lead to criminal charges and convictions against the non-responsive individual. *See* Egan, *Former Kodak Lawyer Charged With Contempt*, Wash. Post, Sept. 19, 1978, at D9; Kiechel, *The Strange Case of Kodak's Lawyers*, Fortune, May 8, 1978, at 188.

> "In all cases where such formulae [*e.g.*, reasonable probability] are used as standards for review, the outcome will usually turn upon which party must bear those risks inherent in speculation as to what may have gone on in the decisional process had the script been presented to the factfinder differently.
>
> ". . . It is true that in cases concerning prosecutors' failure to disclose possible exculpatory materials we need no longer be convinced beyond a reasonable doubt that the outcome would have been the same, but *we must still be persuaded by the government that no other outcome was reasonably likely. The party that created the problem still bears the risk of nonpersuasion.*" (A112) (Gibbons, J., dissenting) (emphasis added).

Judge Gibbons' point was also emphasized by Justice Blackmun in his *Bagley* opinion when he stated a "reviewing court should assess the possibility that such effect might have occurred . . . with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response." 105 S. Ct. at 3384.

Nowhere in the new majority opinion did the court say where the burden of nonpersuasion lay. Given the result reached by the court, it is safe to assume the court placed the burden on the defendant. However, this Court and lower courts have time and again concluded that the burden of nonpersuasion following error should be "put . . . on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." *Chapman v. California*, 386 U.S. 18, 24 (1967); *Hutchins v. Wainwright*, 715 F.2d

512, 517 (11th Cir. 1983), *cert. denied*, U.S. , 104 S. Ct. 1427 (1984); *United States v. Molt*, 615 F.2d 141, 145 (3d Cir. 1980).

The burden of nonpersuasion has been put on the beneficiary of the error in a variety of contexts. It is difficult to imagine why the new majority opinion failed to even address the issue since in analogous cases the burden has been squarely placed on the government. With respect to the admission of prejudicial evidence or comments, this Court has said: "Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless." *Chapman*, 386 U.S. at 24. Thus, when the prosecutor's argument to the jury "continuously and repeatedly impressed the jury that from the failure of petitioners to testify, to all intents and purposes, the inferences from the facts in evidence had to be drawn in favor of the State. . .," the burden of nonpersuasion was placed on the prosecutor. *Id.* at 25.

When the prosecutor comments on the defendant's failure to testify or on the defendant's post-arrest silence, it is the prosecutor who bears the burden of nonpersuasion. *United States v. Barton*, 731 F.2d 669, 674 (10th Cir. 1984); *Eberhardt v. Bordenkircher*, 605 F.2d 275, 278 (6th Cir. 1979). The prosecutor must prove that his comments did not violate the self-incrimination clause of the fifth amendment. *Barton*, 731 F.2d at 674.

Similarly, when the prosecutor uses tainted evidence, he must bear the burden of showing that the defendant's fourth amendment rights were not violated. *United States v. Molt*, 615 F.2d 141, 145 (3d Cir. 1980). Furthermore, when the prosecutor relies on evidence admitted without a proper foundation, he must bear the burden of showing that the defendant's sixth amendment right of confrontation was not violated. *United States v. Ordonez*, 737 F.2d 793, 806 (9th Cir. 1984). In addition, if he improperly uses extrajudicial statements,

he bears the burden of showing that the defendant's sixth amendment rights of confrontation and fair trial have not been violated. *Robinson v. Percy*, 738 F.2d 214, 220 (7th Cir. 1984); *Hutchins v. Wainwright*, 715 F.2d 512 (11th Cir. 1983), *cert. denied*, U.S. , 104 S. Ct. 1427 (1984). And if he improperly uses void prior felony convictions, he must similarly bear the burden of proving that the defendant's sixth amendment right of confrontation was not violated. *Zilka v. Estelle*, 529 F.2d 388, 390 (5th Cir.), *cert. denied*, 429 U.S. 981 (1976).

Even errors not caused by the prosecutor but from which the prosecutor nevertheless benefits may put the burden of nonpersuasion on the prosecutor. In *Anderson v. Warden, Maryland Penitentiary*, 696 F.2d 296, 300 (4th Cir. 1982), *cert. denied*, 462 U.S. 1111 (1983), for example, the trial judge, not the prosecutor, committed the error. The trial judge openly and successfully pressed the defendant's key alibi witnesses to change their testimony during the course of the trial. The United States Court of Appeals for the Fourth Circuit put the burden on the prosecutor to show that the defendant's sixth amendment rights to call witnesses on his behalf and to the effective assistance of counsel and the defendant's fourteenth amendment right to a fair trial were not violated. 696 F.2d at 300.

In this case, the new majority opinion failed to address where the burden of nonpersuasion rested in its *Bagley* analysis. Given that this was a close case where a decision to place the burden on the wrong party would affect not only the court's analysis but the court's outcome as well, and that it is undisputed that the government deliberately failed to reveal *Brady* information despite a specific request from Pflaumer, the court of appeals' failure to discuss who bore the burden — or to put the burden on the government, where it belonged — suggests the strong need for this Court to consider this issue.

Given the importance of the issue of the burden of nonpersuasion in this context, this Court should grant certiorari to complete the clarification of *Brady* law studied in *Bagley*.

3a. At every possible point before and after the jury charge, Pflaumer expressed his concern that the jury might convict him simply because it found that he learned of the fuel tax scheme during the state audits (which began in December of 1979) and then tried to hide what had happened (A-1293 to A-1294, A-1486, A-1498).[5] He asked the court to instruct the jury that the mail fraud and conspiracy charges were completed crimes with the last mailing in June, 1979 and that if the jury found he first learned of the crimes charged after their commission and then participated in the cover-up, it had to acquit him (A-1293 to A-1294, A-1486, A-1498). The requested instruction was particularly significant here because the conspiracy was erroneously alleged to have continued from November, 1976 to January 31, 1981, a period which went far beyond commission of the conspiracy's last object crime (June 30, 1979) and one which encompassed the time of the state audits. The jury might well have found him guilty simply because he engaged in a cover-up. The district judge refused to so instruct, and his refusal was assigned as error requiring a new trial on all counts.

While the panel is now painfully divided over whether its first decision reversed Pflaumer's conviction on all counts or just the conspiracy count, the entire panel joins in the original holding that the conspiracy conviction must be reversed because the charge, as given, permitted the jury to find that Pflaumer joined the conspiracy during the cover-up period — by which time the conspiracy had already ended — in violation of *Grunewald v. United States*, 353 U.S. 391, 406-15

5. All citations to the Appendix submitted in the court of appeals begin with "A-."

(1957), and that, on the facts of this case, there is a "reasonable likelihood" that the jury may have done exactly that. (A24-A30, A83-A90).

The new panel majority went on the hold, however, that the first Pflaumer opinion had not reached the question whether the erroneous conspiracy instruction had infected the entire conviction because it invited the jury to convict Pflaumer vicariously for the 21 mail fraud counts once it found him to be a member of the conspiracy. It found no basis to so conclude, ignoring the fact that the district court had instructed the jury as follows: (1) "In a crime where two or more persons are charged with the commission of a crime, the guilt of any defendant may be established without proof that he personally did every act constituting the offense charged or that he personally participated at all in the offense charged" (A-1456); (2) "He may join [the conspiracy] at any point during its progress, and he may be held responsible for all that has been done before he joins . . . . [B]y becoming a partner he assumes all the liabilities of the partnership including those occurred [sic] before he became a member" (A-1464); (3) "If [he joins the conspiracy] then he adopts as his own the past and future acts of all of the other conspirators" (A-1466); (4) "When people enter into a conspiracy . . . the acts . . . of one co-conspirator . . . are deemed to be the acts of all, and all are responsible for such acts" (A-1468 to A-1469).

Simply put, the trial judge's charge permitted the jury to (1) convict Pflaumer of conspiracy merely if he engaged in a post-conspiracy cover-up after learning of the fuel tax scheme, and (2) convict him of the substantive counts because, as a member of the conspiracy, he adopted as his own and was responsible for all the past acts of his co-conspirators.

b. As Judge Gibbons "was the author of the [original] Court's opinion . . . his analysis of its rationale is especially meaningful." *Lloyd Corporation, Ltd. v. Tanner*,

407 U.S. 551, 562 n.10 (1972). Nevertheless, a new majority panel decided that Judge Gibbons did not say what he says he said and what he says he meant, and that the 21 substantive counts should be affirmed rather than reversed despite the fact that there is still no way of knowing whether Pflaumer was found guilty of the substantive mail fraud counts because the jury found he participated in the scheme prior to June 30, 1979, or whether the jury erroneously found Pflaumer guilty of the conspiracy solely because of his cover-up activities after the conspiracy had terminated — a "reasonable likelihood" according to the court — and as a conspirator guilty of all that had been done before he joined. Despite the confidence of the new panel majority, the district court's instructions permit no substantial assurance that Pflaumer was found guilty for a right reason rather than a wrong reason, and the convictions cannot be affirmed on the assumption that the jury applied the correct theory when it is plain that it might not have.

In *Cramer v. United States*, 325 U.S. 1, 36 n.45 (1945), this Court adopted this same position:

> "The verdict in this case was a general one of guilty, without special findings as to the acts on which it rests. Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted was insufficient."

This is the only proper rule under such circumstances, and the panel's decision violates it. *Grunewald v. United States*, 353 U.S. 391, 414-15 (1957); *United States v. Dansker*, 537 F.2d 40, 51 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Crim. No. 83-113-1
-2
-3
-4

UNITED STATES OF AMERICA

v.

WILLIAM H. PFLAUMER, ET AL

JULY 11, 1983

MEMORANDUM AND OPINION

WEINER, J.

Following an eight day trial beginning June 1, 1983, defendants William H. Pflaumer and Harold Oxman were found guilty by a jury of 21 counts of mail fraud and one count of conspiracy to commit mail fraud. Defendants filed a motion for judgment of acquittal and arrest of judgment and, in the alternative, for new trial. Defendants later filed a supplemental motion for disclosure and for new trial based upon an alleged deliberate government suppression of specifically requested information. An evidentiary hearing concerning defendants' supplemental motion was held on July 5, 1983. For the reasons which follow, both of defendants' motions are denied, and the defendants shall appear before this court for sentencing on Tuesday, July 12, 1983 at 9:30 a.m.

MOTION FOR JUDGMENT OF ACQUITTAL AND ARREST OF JUDGMENT AND, IN THE ALTERNATIVE, FOR NEW TRIAL

A. Exclusion of Evidence

Defendants argue that this court erred in excluding four topics from the trial which defendants claim would have exculpated the defendants.

1. Defendants claim that it was error to exclude the testimony of Edmund Dever and William Elliot[1] concerning excise taxes paid by C. Schmidt and Sons Co. during the time in which the conspiracy took place—from 1977 to 1981. Defendants sought to introduce the testimony of Mr. Dever, Director of Financing and Comptroller of C. Schmidt and Sons Co. as to the payment by C. Schmidt and Sons Co. of federal and state excise taxes. Defendants contend that Mr. Dever's testimony would be exculpatory by demonstrating a history of willingness of Mr. Pflaumer to pay taxes due since he was the sole owner of C. Schmidt and Sons Co. Defendants state this evidence was essential to their theory that the tax fraud scheme was Mr. Gillan's rather than Mr. Pflaumer's.

We remain convinced that evidence as to the payment of various taxes by C. Schmidt and Sons Co. is inadmissible as to the issue of Mr. Pflaumer's willfulness to defraud the states of diesel fuel excise taxes by the nonpayment of taxes by Wm. H.P. Inc. Even if we were to assume that Mr. Pflaumer was directly responsible for the payment of all taxes for both C. Schmidt and Sons Co. and Wm. H.P. Inc., we recognize that generally evidence of noncriminal conduct is irrelevant to negate the inference of criminal conduct. *See, United States* v. *Dobbs*, 506 F.2d 445, 447 (5th Cir. 1975). We do not agree with defendants' contention that the exception of *United States* v. *Magnus*, 365 F.2d 1007 (2d Cir. 1966) is applicable in this case. We cannot say for certain that the payment or non-payment of taxes by C. Schmidt and Sons Co. is evidence of the willingness of Mr. Pflaumer himself to pay taxes. This is so because we are not certain that the history of payment of taxes by C. Schmidt and Sons Co. is actually the history of payment of taxes by Mr. Pflaumer. Therefore, we view this evidence which the defendants sought to introduce as only slightly probative, the introduction of which would confuse or mislead the jury.

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[1] In their Memorandum, defendants do not argue further than this cursory statement as to how the exclusion of Mr. Elliot's testimony constituted error.

2. The defendants object to the exclusion of testimony of Mr. O'Rourk to refute Mr. Luciano's testimony as to the extent of the fraud committed on Temple University. Mr. Luciano testified that excess billings and the creation of false delivery tickets defrauded Temple University in the amount of $86,000 over the course of three years. He also testified that there was no way of verifying this amount. Defendants sought to impeach the credibility of Mr. Luciano by introducing testimony of Mr. O'Rourk who conducted an audit of the excess billing scheme for Temple University. This would constitute impeachment on a collateral matter and was properly excluded under F.R.E. 608(b).

While the defendants appear to recognize that Mr. O'Rourk's testimony would be an inadmissible attack on Mr. Luciano's credibility, the defendants argue that this testimony is essential to demonstrate that the extent of the fraud perpetrated on Temple University was underrepresented by Luciano to the government thereby somehow tainting the immunity agreement and providing Mr. Luciano with an incentive to tell what the government wanted to hear rather than the truth. Regardless of whatever purpose for which the defendants intended to use Mr. O'Rourk's testimony disputing the amount by which Mr. Luciano stated that Temple University was defrauded, this testimony would constitute extrinsic evidence. This extrinsic evidence used to attack Mr. Luciano's credibility is inadmissible under Rule 608(b).

3. Defendants argue error in this court's refusal to specifically instruct the jury that Charles Gillan had pled guilty. The defendants state that it was important to their case that Mr. Gillan had acknowledged his guilt in this matter. However, Mr. Gillan did not appear as a witness in the trial; his not being a witness in the trial was the basis for the court's refusing to give this instruction to the jury.

Defendants argue that an instruction was necessary whether or not Mr. Gillan was called as a witness since they assert that had he appeared, Mr. Gillan would have asserted his Fifth Amendment privilege against self-incrimination. Despite defendants' conjecture as to Mr.

Gillan's willingness to testify, it remains that Mr. Gillan was not called by either party as a witness in the trial, and therefore we remain convinced that his guilty plea should not have been specifically brought to the attention of the jury.

4. The defendants allege error in the court's exclusion of the transcript of Frank Jock's sentencing hearing in the District Court of Delaware. Defendants make an argument similar to that made in point number two, relating to the exclusion of extrinsic evidence to impeach Mr. Luciano's testimony as to the extent of the fraud on Temple University.

Defendants sought to introduce the transcript of the sentencing hearing to show that Mr. Jock was very interested in getting out of prison "as soon as possible." This was to be used as a means of impeaching Mr. Jock's credibility. Regardless of how important defendants believe Mr. Jock's state of mind to be, use of the sentencing transcript would, as in defendants' point number two, constitute impeachment of credibility by the use of extrinsic evidence, which is inadmissible under Rule 608(b), F.R.E.

B. Improper Admission of Prejudicial Evidence

1. Defendants next contend that the court erred in allowing the government to elicit during the direct examination of John Luciano the fact that the immunity agreement Mr. Luciano entered into with the government compelled him to testify truthfully. This claim is without merit. Had the government not brought this matter up on direct, it would, nevertheless, have been permissible on redirect to so question Mr. Luciano since it would have been used to rehabilitate the witness' truthfulness. Consequently, there was no prejudice to the defendants.

Defendants also claim they were prejudiced by remarks made in the government's closing argument where, they assert, the government's attorney vouched for the credibility of several government witnesses. For the reasons that follow, this claim is also without merit. "In the past, the court has distinguished between prosecutorial remarks regarding ... a witness' credibility that are based on the evidence and

those that are based on information outside the record ... the former are grounds for new trial only if the defendant was prejudiced by the remarks." *United States* v. *Swinehart*, 617 F.2d 336, 339 (3d Cir. 1980).

The remarks in the government's closing argument with respect to the credibility of John Luciano and Frank Jock were based on evidence in the record. Specifically, with regard to the government's statement concerning John Luciano, the fact that Luciano's immunity agreement with the government contained a promise to testify truthfully was clearly in evidence. As to the government's assertion that Frank Jock's testimony was corroborated by the government's investigation, this fact was also in evidence as reflected by the trucking company's tax returns and other documents.

Having determined that the remarks were based on evidence in the record, we must determine whether the defendants were prejudiced by the government's closing remarks. We find there was no prejudice. The court instructed the jury that the statements of counsel are not evidence and that the jurors were the sole arbiters of the credibility of the witnesses. They were therefore instructed to consider what was in evidence and to judge each witness' credibility themselves. No prejudice resulted from the government's closing remarks.

2. Defendants assert that it was error for the court to permit cross-examination of Mr. Hill on the issue of payment of his attorney's fees by KMA Leasing. KMA Leasing was owned by Mr. Pflaumer and was Mr. Hill's previous employer. Bias, interest, or motive is always a proper subject of cross-examination. Payment of attorney's fees by a company owned by Mr. Pflaumer could reasonably be viewed by the fact-finder as an indicator of potential bias or partiality. "There is an infinite range of circumstances to which counsel legitimately can refer for the purpose of demonstrating a witness's bias in favor of one party." *Peterson* v. *Calmar Steamship Corp.*, 296 F. Supp. 8, 12 (E.D. Pa. 1969). Partiality is always relevant to the credibility of a witness and will affect the weight which the jury gives to a witness' testimony. *Davis* v. *Alaska*, 415 U.S.

308, 316 (1974). Therefore we disagree with defendant's argument that payment of Mr. Hill's attorney's fees was an improper area of inquiry on cross-examination.

The defendants further contend that the court committed error when, as the defendants see it, the court first indicated that the testimony about the payment of Mr. Hill's legal fees was inadmissible but later changed its ruling. In their memorandum, defendants state that the court had stated prior to Hill's testimony that if Mr. Hill exculpated Mr. Pflaumer, questioning as to payment of Mr. Hill's attorney's fees would be allowed but such questioning would not be permitted if Mr. Hill's testimony did not exculpate Mr. Pflaumer. Defendants argue that Mr. Hill did not exculpate Mr. Pflaumer and therefore it was error for the court to allow questioning on this topic.

Even if the final ruling as to admissibility of this testimony were different from that initially indicated by this court, this would not constitute error. An indication by the court as to what may be permitted at a later point in trial is not a ruling on the evidence. "Preliminary comment by a judge solicited by counsel, regarding a future trial incident, could be helpful as a guide to the court's thinking but it is not a conclusive disposal of the particular controversy which can be taken up." *Ridgway National Bank* v. *North American Van Lines, Inc.*, 326 F.2d 934 (3d Cir. 1964).

The defendants also assert it was error for the court to exclude evidence as to the manner in which the Board of Directors approved the payment of Mr. Hill's attorney's fees. The court excluded evidence on this procedure and gave a limited instruction to the jury on this issue. While the jury instruction did not outline the entire procedure by which payment of Mr. Hill's attorney's fees were authorized, the instruction stated that such payment was permissible as the allegations against which Mr. Hill was defending arose out of his employment by KMA Leasing.[2]

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[2] Hill was acquitted by the jury. This issue might have been a proper issue for defendant Hill had he been found guilty, not the other defendants who the court feels suffered no prejudice on this issue.

3. Defendants next claim that the court erred in allowing government witnesses to testify as to conduct by Mr. Pflaumer which obstructed audits of fuel oil deliveries to Wm. H.P., Inc. Specifically, defendants contend that these events occurred subsequent to December 1979 and, thus, were not within the time frame of events charged in the indictment.

While we agree that the events testified to concerning Mr. Pflaumer's obstructive conduct occurred after the events charged in the indictment, evidence of an "attempt to suppress material records permits an inference of consciousness of guilt and therefore of guilt itself." *United States* v. *Mastropieri*, 685 F.2d 776, 790 (2d Cir. 1982).

In the case *sub judice*, the record reveals that Mr. Pflaumer attempted to suppress material records (Fuel Oil Invoices). (Tr. 907) This evidence was therefore admissible to permit an inference of consciousness of guilt "and therefore guilt." Consequently, defendant's claim is without merit.

4. The defendants argue that the government's attorney improperly and prejudicially referred to Mr. Pflaumer's trucking company not paying federal excise taxes. They state in their own brief that the court "cautioned the jury that it could not consider any evidence as to the federal excise tax on fuel because it was not part of this case. (Tr. 175) (Defendants' paper #47, page 18). This caution sufficiently advised the jury that federal excise taxes were irrelevant to their consideration of the case they were soon to decide. The jury was also given the indictment to take into the jury room. The indictment served as a focus of the issues they had to decide.

Certainly, even if the court were to conclude that the government's attorney improperly argued to the jury about Mr. Pflaumer's knowledge that part of the scheme was evading federal excise taxes, there is no reason to believe that the jury failed to heed the earlier caution to the jury on this matter. Furthermore, such a remark cannot be sufficient to warrant a new trial.

C. Legal Error

1. The defendants seek reconsideration of this court's denial of three pretrial motions which sought: (1) dismissal of the indictment; (2) a disclosure of the affidavits submitted in support of the request for a search warrant; and (3) disclosure of transcripts of grand jury proceedings, attendance records and voting tallies. They rely on the grounds set forth in their pretrial motions and accompanying memoranda. This court perceives no reason to modify or vacate our May 25, 1983 Memorandum Opinion and Order and therefor affirms it.

2. (a) The defendants contend that the government's case against Mr. Pflaumer amounts to testimony of events occurring during the time the scheme was ongoing and testimony regarding information Pflaumer learned from state auditors after June 1979, the last date of the scheme charged in the indictment. They argue that Pflaumer could have been acquitted if the government failed to prove beyond a reasonable doubt that Mr. Pflaumer knowingly and willfully became a member of the conspiracy prior to June 1979 and that a jury instruction offered to cover that point was refused by the court. The essence of the instruction requested by the defendants is:

> If you find that Mr. Pflaumer only became aware of the alleged conspiracy or scheme to defraud Pennsylvania, New Jersey and Maryland of diesel fuel taxes at the time of these audits, you must acquit Mr. Pflaumer of all charges. In short, if you find that the Government has not proved beyond a reasonable doubt that Mr. Pflaumer knowingly and willfully became a member of the alleged conspiracy or scheme to defraud Pennsylvania, New Jersey and Maryland of diesel fuel taxes prior to June, 1979, you must acquit Mr. Pflaumer of all charges.

The instruction given by the court on this point states:

> In other words, it is not required that a person be a member of the conspiracy from its very start—he may join in at any point *during its progress*, and be held responsible for all that has been done before he joined, and all that may be done thereafter *during its existence* and while he remains a member.

Clearly this instruction does not suggest to the jury that they could find Mr. Pflaumer guilty solely on events occurring after the scheme terminated. The instruction is in keeping with the Third Circuit's law on conspiracy that "[p]arties may join the conspiracy after its inception.... And even if a small group of co-conspirators are at the heart of an unlawful agreement, others who knowingly participate with the core members and others to achieve a common goal may be members of a single conspiracy." *United States* v. *Boyd*, 595 F.2d 120, 123 (3d Cir. 1978) (citations omitted).

A further instruction from the court served to clarify the required elements of membership in a conspiracy:

> I want to caution you, however, that mere association with one or more conspirators does not make one a member of a conspiracy. *Nor is knowledge of a conspiracy, without participation therein sufficient to constitute membership.*

The court is satisfied that the jury was properly instructed on this point.

2. (b) The defendants contend that the court erred in its instruction to the jury on the payment of defendant Raymond Hill's attorney's fees. The jury was told that KMA Leasing was Mr. Hill's former employer and that KMA is permitted to pay his legal fees since the allegations in the indictment arise out of Mr. Hill's employment with KMA. The instruction requested by the defendants included further details as to who authorized the payment and that Mr. Pflaumer was not involved in the authorization. The court finds no error in its instruction and finds that it gave the jury the information it needed to properly judge the testimony regarding the payment of legal fees. The court specifically informed the jury that KMA was making the payment of legal fees.[3]

2. (c) The defendants argue that the charge to the jury regarding accomplice testimony was insufficient and the failure to give the requested charge was error. The court cautioned the jury that it "should keep in mind that [accom-

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[3] See Footnote 2 supra.

plice] testimony is always to be received with caution and weighed with great care." The defendants contend that this instruction fails to provide the jury with any guidance as to the motive underlying accomplice testimony. Error is assignable in some jurisdictions if the court fails to give accomplice credibility instruction. *United States* v. *Patterson*, 648 F.2d 625, 631 (9th Cir. 1981). This court did give accomplice credibility instruction, bringing to the jury's attention their need for caution in evaluating the testimony. The common sense of the jury is not to be undermined when it is told that the witness made an agreement with the government and that the witness' testimony is to be weighed with great care. Even the defendants acknowledge elsewhere in their argument for a new trial that "the witness' motivation for testifying is to be resolved by the fact-finder, the jury, and not the prosecutor or the court." (Defendants' paper #55, page 10). The law does not require that the court do more than instruct the jury as it did.

SUPPLEMENTAL MOTION FOR DISCLOSURE AND FOR NEW TRIAL

The defendants claim that the government deliberately suppressed an immunity letter which it had given to Ralph Wille, who appeared as a government witness in this case. Mr. Wille testified that Pflaumer played an active role in the day-to-day affairs of the trucking company, from which was operated a diesel fuel tax scheme.

The government claims that the immunity given to Wille was not in the case *sub judice*, but rather in an unrelated case involving a check-kiting scheme.

We recognize that a new trial is warranted when suppressed evidence might have affected the outcome of a trial. *United States* v. *Agurs*, 427 U.S. 97 (1976). We however find that the government did not fail to provide required information, and that the alleged suppressed evidence would not have affected the outcome of the trial.

On April 12, 1983 defendants' counsel, Donald J. Goldberg, Esquire, wrote to Ronald G. Cole, Esquire, counsel for the government requesting documents or other information relating to any promises, understandings or agreements made in connection with other cases or investi-

gations. Mr. Cole, by letter, replied that there was such information, which he provided, concerning Mr. Jock and Mr. Luciano,[4] but mentioned no other witness.

"[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material . . ." *Brady* v. *Maryland*, 373 U.S. 83, 87 (1967). Where the requested information is not material, the government has no duty to turn it over the defense. The question we must resolve is whether the immunity agreement between the government and Ralph Wille was material to the case *sub judice*.

In determining whether information is material, courts "have framed the test in terms of that which is reasonably likely to have changed the jury's judgment." *United States* v. *McCrane*, 527 F.2d 906, 911 (3d Cir. 1975). In other words, if the testimony of the witness who would have been impeached by suppressed information is merely corroborative, the information withheld by the government was not material and need not have been turned over to the defense under *Brady*.

With respect to the case *sub judice*, we find that the testimony of Ralph Wille was merely cumulative and that, even if the defense had been able to impeach Mr. Wille with the requested information, the outcome of the trial would have been the same.

Frank Jock testified that he entered into a conspiracy with Mr. Pflaumer. John Luciano also testified as to Mr. Pflaumer's involvement. Indeed, defendants' memorandum in support of motion for judgment of acquittal acknowledges the inculpatory nature of their combined testimony. Defendants' memorandum states "Mr. Luciano does not directly inculpate Mr. Pflaumer to the same degree that Mr. Jock does . . ." (Memorandum of Defendants, In Support of Motion for Judgment of Acquittal, pp. 7 and 8). Clearly, therefore, even if the defendants had been able to impeach Wille by virtue of the immunity agreement, there was sufficient other evidence implicating Mr. Pflaumer.

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[4] Witnesses in the case *sub judice*.

The result we reach is reinforced by the fact that at a July 5, 1983 hearing on defendants' motion for a new trial the only evidence presented to support Mr. Pflaumer's contention that he was unaware of Mr. Wille's agreement with the government in another case was an affidavit by Mr. Pflaumer attesting to his lack of such knowledge until the day after his conviction. The affidavit was admitted over the objection of the government. Although Mr. Pflaumer was present at the hearing, he chose not to testify thereby denying the government an opportunity to cross-examine him on this issue. We note as well that the check-kiting scheme in which Wille was involved and about which he was to provide immunized testimony was operated from offices shared with other Pflaumer companies, thereby creating some question as to Mr. Pflaumer's lack of knowledge of Wille's cooperation with the government.

For the foregoing reasons we have denied all motions of the defendants in our order dated July 8, 1983.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1531

UNITED STATES OF AMERICA

v.

HAROLD OXMAN,

Appellant

(D.C. Criminal No. 83-00113-03)

No. 83-1532

UNITED STATES OF AMERICA

v.

WILLIAM H. PFLAUMER,

Appellant*

(D.C. Criminal No. 83-00113-01)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Argued: April 6, 1984
Before: GIBBONS and SLOVITER, *Circuit Judges*
and MENCER, *District Judge**

(Opinion Filed: August 1, 1984)

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* Hon. Glenn E. Mencer, United States District Judge for the Western District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

GIBBONS, *Circuit Judge*.

Harold Oxman and William H. Pflaumer appeal from sentences imposed following their convictions of mail fraud, 18 U.S.C. § 1341 (1982), and conspiracy to commit mail fraud, 18 U.S.C. § 371 (1982). Their convictions arise from a scheme to defraud the states of Pennsylvania, Maryland, and New Jersey of fuel excise and road use taxes properly due from a corporation, Wm. H.P., Inc. (WHP), owned by Pflaumer. The defendants contend that certain errors in the conduct of the trial and the government's deliberate nondisclosure of evidence favorable to the defense require a new trial. We conclude that Oxman's conviction must be affirmed, but that in Pflaumer's case an erroneous charge and the deliberate nondisclosure of evidence favorable to the defense require a new trial.

I.

The Scheme

Pflaumer is the sole stockholder of WHP, a corporation engaged in the trucking business in Philadelphia, Pennsylvania. Charles Gillan was the President of WHP; Raymond Hill was its Philadelphia Terminal manager, Ralph Wille its comptroller. Pflaumer owns several other businesses, including a Philadelphia brewery, C. Schmidt & Sons, Inc., and another trucking firm, Burgmeyer Bros., Inc. Oxman was, at relevant times, a commission salesman for Park Oil Co., a fuel oil supplier in Newark, Delaware. Before

it went out of business. Park Oil was owned by Oxman's cousin, Frank Jock. United Fuel Oil and Burner Co. is a fuel oil supplier in Philadelphia, owned by John Luciano.

WHP's diesel fuel is purchased in bulk, delivered to the WHP terminal in Philadelphia. As a bulk purchaser, WHP is entitled to file monthly returns and make monthly payments of the nine cents-per-gallon Pennsylvania excise tax on diesel fuel. Pennsylvania also charges a road use tax of nine cents per gallon. Taxpayers are permitted to offset any state fuel excise taxes against the road use tax. Maryland and New Jersey both have similar fuel excise and road use taxes, at rates of eight cents per gallon. The scheme charged in the indictment involved the alteration of invoices for diesel fuel supplied to WHP at its Philadelphia terminal in order to indicate, falsely, that the fuel was delivered to WHP in Maryland or New Jersey. This permitted the filing of false monthly excise tax returns with the Commonwealth of Pennsylvania which underreported the excise taxes due to that state. WHP filed no excise tax returns with Maryland and New Jersey but, on road use tax returns, claimed credit for excise taxes on bulk purchases allegedly delivered in those states. Mailings in furtherance of the scheme took place between April of 1978 and June of 1979. The indictment charges 21 substantive counts of mail fraud and a single count of conspiracy to commit mail fraud. Those indicted for mail fraud are Gillan, Oxman, Pflaumer and Hill. These four and Luciano are charged in the conspiracy count, which names Frank Jock as an unindicted co-conspirator. Wille is not named either as a defendant or as a co-conspirator.

Prior to trial Gillan pleaded guilty to all counts. Pursuant to a plea agreement with the government, Luciano pleaded guilty to the conspiracy count.

Oxman, Pflaumer and Hill stood trial. At trial the government sought, through the testimony of Luciano, Jock, Wille, and others, to establish that Oxman, Pflaumer and Hill all knew of the false invoice and tax fraud scheme, details of which are referred to hereafter. The theory of the defense was that while the mail fraud occurred, it was a matter about which the defendants had no knowledge and for which Gillan was solely responsible. Gillan did not testify.

II.

Pre-trial Discovery

Before trial Pflaumer tendered a number of discovery requests to the government. One series of requests sought all evidence having to do with criminal conduct on the part of any person to be called as a prosecution witness.[1] A second series sought documents evidencing benefits conferred on, or agreements made with, potential government

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1. Paragraph 26 of Pflaumer's initial discovery request sought

> Any information, in any form whatsoever, the existence of which is known, or by the exercise of due diligence may become known, to the government bearing upon the credibility of any person whom the government intends to call at trial, including but not limited to any prior criminal arrest or conviction, any pending criminal indictment or information, and any pending criminal or civil investigation related to any activity of such person.

App. at 1513. Paragraph 16 requested

> any and all evidence having to do with criminal conduct -- local, state or federal -- on the part of any person whom the prosecution intends to call as a witness at trial, of which the prosecution, its agents and representatives have become aware.

App. at 1511.

witnesses, including, specifically, immunity agreements.[2]

In response to these quite detailed requests, the government disclosed to counsel the prior criminal records of Luciano and Frank Jock, and disclosed that the government had entered into agreements with both men in exchange for their "truthful cooperation." Luciano's agreement involved his pleading guilty to the conspiracy count and to an independent charge of federal tax evasion. In exchange for his cooperation, the government agreed to forego further prosecution of Luciano and to report his cooperation at sentencing. Jock was already serving a term of incarceration for prior convictions. For his cooperation the government agreed to advise the Parole Board that he was cooperating and would be a good candidate for parole.

Although the requests were specific and covered all witnesses, the Luciano and Jock agreements were the

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2. Paragraph 18 sought

> any and all promises, understandings, or agreements, formal or informal, between the prosecution, its agents and representatives and persons (including counsel for such persons) whom the government intends to call as witnesses at trial, together with copies of all documentation pertaining thereto. This request includes, but is not limited to, such promises, understandings, or agreements as may have been made in connection with other cases or investigations.

App. at 1512. Similarly, paragraph 30 requested

> [a]ny and all actions, promises, efforts or inducements -- formal or informal -- on the part of the government, its agents and representatives to aid, assist or obtain benefits of any kind at any time for any person whom the government now considers a potential witness at trial
>
> . . . .

App. at 1513.

only agreements disclosed to the defense. This, despite the fact that, as the United States Attorney well knew, the United States had entered into a written agreement, quoted in full in the margin,[3] by which

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3.

September 26, 1980

Stephen A. Madva, Esquire
3 Parkway
20th Floor
Philadelphia, PA 19102

Re: Ralph P. Wille

Dear Mr. Madva:

This letter will memorialize our understanding and agreement regarding the cooperation and testimony of Ralph P. Wille *relative to the federal investigation into certain activities of Charles Gillan and others during the period between June 2, 1978 and December, 1979.*

It is the understanding of the parties hereto that Ralph P. Wille is prepared to cooperate with the United States Government *with respect to the above-mentioned investigation.*

In exchange for Ralph P. Wille's complete cooperation and testimony at any hearings and/or trials *pertaining to the above-mentioned investigation*, the Government agrees that the information and testimony provided by Ralph P. Wille will not be used against him in any criminal prosecution, nor will any information or evidence derived from the information and testimony provided by Ralph P. Wille be utilized against him in any criminal prosecution in this district.

It is agreed by Ralph P. Wille that under this agreement he is obligating himself to provide truthful information and testimony, without reservation, *regarding any and all of the matters relating to the above-mentioned investigation.* As part of this understanding, Ralph P. Wille will hold himself available for interviews with the Government, in addition to testifying at any other hearing or

Wille was given use immunity with respect t information or evidence "relative to the federa investigation into certain activities of Charles Gillar and others du.ing the period between June 2, 1978 and December, 1979." App. at 1529. The Wille agreemen was not disclosed to the court or to counsel. Counse for the defendants were unaware of the agreemen until June 15, 1983, the day after the jury verdict, when Pflaumer's counsel heard about it from another attorney.

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trial proceedings when called upon to do so by th Government.

By the phrase "complete cooperation an testimony" the United States Attorney's Office and Ralph P Wille understand that he will provide full and truthfu responses to all questions asked, under oath or otherwise, b Government attorneys and their agents *with respect to hi complete knowledge and information regarding th investigation referred to above*. Ralph P. Wille also agree that, upon request by the Government or its agents, he wi voluntarily take, and pass, a polygraph examination.

It is understood that the phrase "truthfu information and testimony, without reservation" require that Ralph P. Wille avoid falsely implicating any person a well as protecting any person or omitting any inculpator testimony. In the event Ralph P. Wille is called upon by th Government to take a polygraph examination and hi responses to that examination suggest a conscious intent t deceive or prevaricate, he will be afforded an opportunity t review and explain the deceptive responses to th Government. If the totality of circumstances convinces th Government that his statement is not complete and truthful he will be so informed and any and all obligations under thi agreement may be rendered null and void. Moreover, an withholding of information and/or the providing of fals information by Ralph P. Wille will terminate th Government's obligations under this agreement and caus this agreement to become null and void. In the event tha Ralph P. Wille fails to comply with any of the terms of thi

III.

Claimed Trial Error

A. *Vouching for the Credibility of Jock and Luciano*

Oxman and Pflaumer both contend that a new trial is warranted because the prosecuting attorney, during the trial and in closing argument, vouched for the

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agreement, and the agreement is thereby terminated by the Government, any and all information and testimony provided by Ralph P. Wille can be used against him in the event the Government chooses to proceed criminally against him.

It is also understood that if the Government discovers that Ralph P. Wille received any benefit from the activities described in paragraph 1 of this letter other than salary and reasonable and customary benefits related to his employment at Burgmeyer Bros., Inc., this agreement may be terminated by the Government and any and all information and testimony provided by Ralph Wille can be used against him in the event the Government chooses to proceed criminally against him.

Furthermore, any false information and/or testimony so provided by Ralph P. Wille under oath can be prosecuted under the perjury and false statement laws of the United States, and nothing in this agreement shall be construed, in any manner, to affect the Government's right to so prosecute.

Very truly yours,

Peter F. Vaira
United States Attorney

Stephen V. Wehner

Assistant United States Attorney

App. at 1529-31 (emphasis added).

truthfulness of the witnesses Frank Jock and John Luciano.

The alleged instances of vouching during the trial occurred when on direct examination the prosecuting attorney called to the jury's attention that the plea agreements, which had been disclosed to defense counsel, obliged them to testify truthfully. The government could reasonably anticipate that the beneficial features of the agreements would be used for impeachment purposes on cross-examination. If they were so used, reference to the condition requiring truthful testimony would be proper rehabilitation. *See, e.g., United States v. Rohrer*, 708 F.2d 429, 433 (9th Cir. 1983); *United States v. Edwards*, 631 F.2d 1049, 1051-52 (2d Cir. 1980). Since the government could reasonably anticipate such impeachment, it was not improper to anticipate it on direct examination by disclosing the truthful-testimony condition. *See United States v. Henderson*, 717 F.2d 135, 137-38 (4th Cir 1983), *cert. denied*, 104 S. Ct. 1006 (1984). Indeed, some courts have held that reference to the truthful-testimony condition is proper even when the witness' credibility is not put in issue. *See United States v. Winter*, 633 F.2d 1120, 1133 (1st Cir. 1981); *United States v. Hedman*, 630 F.2d 1184, 1198-99 (7th Cir. 1980); *United States v. Craig*, 573 F.2d 513, 519 (7th Cir.), *cert. denied*, 439 U.S. 820 (1978).

The vouching during closing argument on which Oxman and Pflaumer rely occurred when the prosecuting attorney argued:

> John Luciano's testimony and the agreement that he entered into with the government is tied in to a condition that is written, and it is carved in stone, and there is no way around it. John Luciano must tell the truth. If he does not, he is going to be in far worse trouble than he already is.

App. at 1424-25. These two sentences, while hyperbolic, accurately describe the agreement with Luciano and the likely consequences of its breach. They were, therefore, appropriate responses to the defendants' attack on Luciano's credibility. Several sentences later, however, the prosecuting attorney continued:

> If I made a mistake in entering into that deal with John Luciano, then I personally will have to be responsible for it.

App. at 1425. The reference to counsel's personal responsibility in the event the jury believed him "mistake[n] in entering into that deal with John Luciano" was not an appropriate response. But this isolated reference to the possibility that the prosecuting attorney would be personally disadvantaged for entering injudiciously into a plea bargain with a witness, while in our view improper, is not ground for a new trial. Fed. R. Crim. P. 52(a).

B. *Exclusion of Evidence*

1. *Other crimes evidence*

Oxman contends that the trial court erred in excluding the testimony of an accountant that Luciano had defrauded Temple University of over $350,000. The trial court properly held that this evidence of specific instances of misconduct of a witness was inadmissible by virtue of Fed. R. Evid. 608(b).

2. *Evidence of other tax payments*

Pflaumer urges that the trial court erred in excluding evidence that during the time WHP was defrauding the states of Pennsylvania, Maryland, and New Jersey of about $200,000 in excise taxes, another company owned by him, C. Schmidt & Sons, Inc., was paying the federal government about $40 million a year

in excise taxes. Pflaumer contends that this evidence would tend to negate any motive on his part to participate in the small fraud committed by WHP. The trial court excluded the testimony under Fed. R. Evid. 403 on the ground that any probative value it might have would be outweighed by the possibility of jury confusion. We find no abuse of discretion in that ruling.

C. *Jury Instructions*

Pflaumer contends that the trial court erred in refusing to give a proffered instruction as follows:

> The indictment charges that the last tax return mailed as part of the alleged scheme and conspiracy was dated June 30, 1979. It was at that time, therefore, that the alleged conspiracy or scheme terminated. You may not find any defendant guilty merely on the basis of anything he did or said after June, 1979. This is because a conspirator cannot join a conspiracy or scheme after its attempts to achieve illicit objectives [have] ended. . . . In short, if you find that the government has not proved beyond a reasonable doubt that Mr. Pflaumer knowingly and willfully became a member of the alleged conspiracy or scheme to defraud Pennsylvania, New Jersey and Maryland of diesel fuel taxes prior to June, 1979, you must acquit Mr. Pflaumer of all charges.

App. at 1498. To understand this request one must appreciate what was charged in the indictment.

The first twenty-one counts alleged twenty-one separate mailings, each a separate substantive violation of 18 U.S.C. § 1341 (1982). The first mailing took place on April 3, 1978, the last on June 30, 1979. These mailings were alleged to violate section 1341 because they were for the purpose of executing a

scheme or artifice, which arguably extended over a longer period, to defraud the three states. The scheme itself does not, however, violate federal law; only the use of the mailings to effectuate the scheme does so. *See Kann v. United States*, 323 U.S. 88, 94-95 (1944); *United States v. Tarnopol*, 561 F.2d 466, 471 (3d Cir. 1977).

The twenty-second count charges a conspiracy in violation of 18 U.S.C. § 371 (1982), which proscribes conspiracies "to commit any offense against the United States." The conspiracy charged in the indictment alleges:

> a scheme and artifice to defraud the Commonwealth of Pennsylvania, the State of New Jersey, and the State of Maryland by means of false and fraudulent pretenses and representations, and for the purpose of executing such scheme and artifice to defraud and attempting so to do, to place in and cause to be placed in an authorized depository for mail matter, certain matter as described in Counts One through Twenty One, in violation of Title 18 United States Code, Section 1341 . . . .

App. at 17. As with the substantive section 1341 counts, the fraudulent scheme itself does not violate the federal conspiracy statute. The federal conspiracy must be to violate a federal substantive law -- in this instance, the substantive prohibition against the use of the 21 mailings alleged in the first 21 counts.

Pflaumer's point in making the quoted request for charge was straightforward. A conspiracy to violate a substantive prohibition in a federal statute ends when the unlawful object has been accomplished. *Grunewald v. United States*, 353 U.S. 391, 406-15 (1957). The object of the conspiracy charged in the indictment was the use of the mails to effectuate a

scheme to defraud three states of tax revenues. Although the scheme may have continued until 1981 -- an issue on which we express no opinion -- the use of the mails to effectuate the scheme ceased in 1979. Thus, the conspiracy charged in the indictment ended in June of 1979, and in order to convict the jury most have found that Pflaumer joined the conspiracy before that date.

From the viewpoint of Pflaumer's defense, this issue was quite significant. There is evidence from which the jury could have found that when state agencies conducted audits of WHP after June of 1979, Pflaumer's actions tended to conceal the scheme. This evidence was admitted at trial *not* to show Pflaumer's membership in the conspiracy -- that was prohibited by *Grunewald* -- but to raise an inference of consciousness of guilt. *See United States v. Mastropieri*, 685 F.2d 776, 790-91 (2d Cir.), *cert. denied*, 103 S.Ct. 260 (1982); App. at 1665-66. The jury, however -- not finely versed in these subtle distinctions -- might have mistakenly applied evidence of concealment to show membership in the conspiracy. Hence Pflaumer requested an instruction expressly charging that the jury must, in order to convict, establish membership in the conspiracy based on evidence of acts before June of 1979.

The court refused the requested instruction. The government defends that refusal on several grounds. One is that post-June 30, 1979 efforts at concealment "constitute a ratification of the co-conspirator's antecedent conduct including any mailings made in furtherance of the scheme." Appellee's Br. at 50. That contention must be rejected because it conflicts with *Grunewald v. United States*, *supra*, which holds that acts of concealment after the principal object of the conspiracy (here use of the mails to defraud three states of tax revenues) has been completed do not

comprise part of the conspiracy. *See* 353 U.S. at 403-06

Alternatively, the government contends that the charge as given was substantially in accordance with the request. The court charged in part:

> In order to find any defendant guilty on Count 22 [conspiracy] you must find all the following elements beyond a reasonable doubt:
>
> (1) That the conspiracy described in the Indictment was existing at or about the time alleged;
>
> (2) That the particular defendant willfully became a member of the conspiracy with knowledge of its illegal objectives;
>
> (3) That one of the conspirators thereafter knowingly committed at least one of the overt acts alleged in the indictment, at or about the time charged and during the period of the conspiracy; and
>
> (4) That the overt act was knowingly done in furtherance of some object or purpose of the conspiracy as charged.
>
> If you should find beyond a reasonable doubt from the evidence that the existence of the conspiracy charged in the Indictment has been proved and that during the existence of that conspiracy one of the overt acts alleged was knowingly done by one of the persons found by you to have been a conspirator, in furtherance of some object or purpose of the conspiracy, that proof of the conspiracy is complete; and it is complete as to every person found by you to have been willfully a member of that conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

App. at 1458-59. Had the court stopped at this point,

we could have accepted the government's alternative argument. This much of the charge, while less specific in advancing Pflaumer's theory than the requested instruction, is not inconsistent with the indictment and complies with *Grunewald*. But the court continued:

> [1] The Indictment alleges numerous overt acts in furtherance of *each* conspiracy. What must be shown is that after the defendant, whom you are considering, joined the conspiracy, some one of the conspirators performed an overt act in furtherance of the conspiracy.
>
> [2] Keep in mind that the Government must establish beyond a reasonable doubt that at least one of the overt acts as alleged in the Indictment occurred while the conspiracy was still in existence. *That is, the overt act must have occurred between approximately November, 1976, and January, 1981. You're not to consider any acts that occurred after the conspiracy was terminated.*

App. at 1467-68 (emphasis added). Thus, the court charged that the jury may find that the defendants joined "each conspiracy" as late as January, 1981. Plainly the court here rejected Pflaumer's theory that a section 371 conspiracy to violate the mail fraud statute ends with the last mailing, here in June of 1979. The reference to plural conspiracies, and to overt acts after June 30, 1979, suggests that the court focused on a conspiracy to defraud the states as itself a violation of section 371. Such a conspiracy would not be a violation of section 371, nor does the indictment so charge. In any event, because the charge permitted the jury to find that the defendants joined the conspiracy after its

principal object had terminated in June of 1979, the charge as given is inconsistent both with the indictment and with *Grunewald v. United States, supra.*

Finally, the government notes that, as the penultimate paragraph of the charge above (denoted [1]) indicates, the court charged that "[w]hat must be shown is that *after the defendant . . . joined the conspiracy, some one of the conspirators performed an overt act* in furtherance of the conspiracy." App. at 1467. The last overt act charged in the indictment occurred in March of 1978. The jury had a copy of the indictment. Therefore, the government maintains, although the charge permitted the jury to find an overt act as late as January, 1981, the jury must have found an overt act no later than March of 1978. Thus, the government concludes, the jury must have found that Pflaumer joined the conspiracy before that date. Appellee's Br. at 47.

We cannot agree. We see no basis for believing that the jury would ignore the court's instruction that it may find that the last overt act occurred in 1981. And we view with skepticism the suggestion that the jury would have understood which of the court's instructions to obey and which to ignore. Moreover, the jury heard a significant amount of evidence suggesting possible concealment by Pflaumer after 1979, inviting it to do exactly what Pflaumer feared -- find that he joined the conspiracy after the last mailing. Thus, far from suggesting that the jury may have ignored the court's instructions, the evidence suggests that it may well have done precisely what the jury is expected to do: abide by them.

We must also determine whether the error is harmless. Fed. R. Crim. P. 52(a). If the evidence connecting Pflaumer to the conspiracy prior to June 30, 1979 were overwhelming, we could accept such an

analysis. But as we observe in Part IV *infra*, that is not the case. Although some evidence tended to connect Pflaumer to the conspiracy before 1979, it is not sufficient to negate the possibility that the jury established his membership based in significant part on the post-1979 evidence. Because there is a reasonable likelihood that the jury may have considered acts of concealment as evidence of membership in the conspiracy alleged, we cannot find the error harmless.

Pflaumer's counsel preserved his objection to this aspect of the charge at its completion. App. at 1486. Oxman neither requested a charge with respect to the termination date of the conspiracy nor objected to the charge, evidently for the reason that none of the evidence bearing on possible concealment by Pflaumer after June 30, 1979, implicated him. Thus the error in the charge affected only Pflaumer.

IV.

The *Brady* Violation

As we noted in Part II above, Oxman and Pflaumer made specific requests for information on agreements with prospective government witnesses, and the government knowingly elected not to reveal to the court or counsel the agreement with Wille quoted at note 3, *supra*. Both appellants rely on this concealment as a ground for a new trial. Under governing precedents a separate analysis of the impact of the concealment must be made for each defendant.

A. *The Governing Law*

In 1942, prior to the adoption of the Federal Rules of Criminal Procedure, a unanimous Supreme Court held that the deliberate suppression by state authorities of evidence favorable to a defendant violates

due process. *Pyle v. Kansas*, 317 U.S. 213, 216 (1942).[4] The *Pyle v. Kansas* rule was uncomplicated, and in this court it was applied in a relatively straightforward manner. It was not limited to the use of perjured testimony or to instances in which a request for exculpatory evidence was made. *See United States ex rel. Almeida v. Baldi*, 195 F.2d 815, 820 (3d Cir. 1952) (state's failure to disclose ballistics evidence helpful to defense), *cert. denied*, 345 U.S. 904 (1953); *United States v. Rutkin*, 212 F.2d 641, 644-45 (3d Cir. 1954) (federal failure to disclose statement of a potentially useful defense witness); *United States ex rel. Thompson v. Dye*, 221 F.2d 763, 765 (3d Cir.) (state failure to disclose evidence of defendant's intoxicated condition at time of arrest), *cert. denied*, 350 U.S. 875 (1955).

By the time these cases were decided, however, the

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4. *See* 317 U.S. at 215-16 (emphasis added):

> Petitioner's papers . . . set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, *and from the deliberate suppression by those same authorities of evidence favorable to him*. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution.

These holdings derived from Mooney v. Holohan, 294 U.S. 87, 110 (1935) (per curiam), in which the petitioner had urged "that the 'knowing use' by the State of perjured testimony to obtain the conviction and the deliberate suppression of evidence to impeach that testimony constituted a denial of due process of law." The *Mooney* Court's holding, however, was limited on its face to the use of "testimony known to be perjured." *Id.* at 112. In *Pyle* the Supreme Court first held squarely that the deliberate suppression of favorable, non-perjured evidence violates due process. The fact that *Pyle* was not limited to the use of perjured testimony is occasionally overlooked. *See* United States v. Agurs, 427 U.S. 97, 103 n.8 (1976).

Federal Rules of Criminal Procedure had been adopted. Rule 16, dealing with pretrial discovery in criminal proceedings, was drafted on the assumption that there was no right to discovery in criminal cases.[5] That assumption, which is still the underlying predicate for

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5. The original Rule 16 provided:

> Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

327 U.S. 821, 846 (1946). The Notes of the Advisory Committee explained:

> Whether under existing law discovery may be permitted in criminal cases is doubtful. *United States v. Rosenfeld*, 57 F.2d 74, C.C.A.2d, certiorari denied, 286 U.S. 556, 52 S.Ct. 642, 76 L.Ed. 1290. The courts have, however, made orders granting to the defendant an opportunity to inspect impounded documents belonging to him. *United States v. B. Goedde and Co.*, 40 Fed. Supp. 523, 534, E.D. Ill. The rule is a restatement of this procedure. In addition, it permits the procedure to be invoked in cases of objects and documents obtained from others by seizure or by process, on the theory that such evidential matter would probably have been accessible to the defendant if it had not previously been seized by the prosecution. The entire matter is left within the discretion of the court.

Fed. R. Crim. P. 16 advisory comm. note. Rule 16 has since 1946 been modified from time to time so as to permit more discovery than the 1946 version authorized.

Rule 16, produced inevitable tension with the due process rule of *Pyle v. Kansas*. That rule seemed to impose on prosecutors an affirmative obligation to make evidence available arguably favorable to a defendant, even though for the most part only a limited procedure existed for defendants to demand such discovery. Surprisingly, the Advisory Committee Note on the original Rule 16 made no reference to *Pyle v. Kansas*. Not surprisingly, this court's opinion in *United States v. Rutkin*, our first occasion to apply the due process rule to a federal prosecutor's failure to disclose, relied on *Pyle v. Kansas* and made no mention of Rule 16. Obviously the supposed general rule against discovery in criminal cases, at best a federal common law rule, yielded to a due process requirement.

In *Brady v. State*, 226 Md. 422, 174 A.2d 167 (1961), the Maryland Court of Appeals held that the state's failure to disclose an arguably exculpatory statement violated the *Pyle v. Kansas* rule. The Maryland court made no mention of any request by the defendant. *Id.* at 427, 174 A.2d at 169 (relying on *United States ex rel. Almeida v. Baldi*, *supra*, and *United States ex rel. Thompson v. Dye*, *supra*). The statement, a confession by an accomplice named Boblit, asserted that Boblit had strangled the victim. The court held that had the jury been informed that Boblit was the strangler, it might not have imposed the death penalty. Because the evidence did not bear on whether Brady was guilty of first degree murder, however, the court limited a new trial to the death-penalty issue alone. *Id.* at 430-31, 174 A.2d at 171. Only Brady petitioned for certiorari. 371 U.S. 812 (1962). Thus, the only issue presented to the Supreme Court was whether the state prosecutor's concededly unconstitutional suppression of evidence required a new trial on guilt as well as punishment. The issue of whether the prosecutor's suppression of

evidence violated due process was neither briefed nor argued.[6]

The Supreme Court affirmed that the separate trial on punishment did not violate due process. *Brady v. Maryland*, 373 U.S. 83, 90 (1963). Justice Douglas' opinion is unfortunately unanalytical, in that it expresses approval of two of the Third Circuit cases mentioned above, of *Pyle v. Kansas*, and of the holding of the Maryland Court of Appeals that the *Pyle v. Kansas* rule had been violated, none of which had been briefed, argued, or was at issue in the appeal. Moreover, the opinion adds:

> We now hold that the suppression by the prosecution of evidence favorable to an accused *upon request* violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

373 U.S. at 87 (emphasis added). Of course, this

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6. The sole question presented by Brady for review was

> [w]hether the restriction of the petitioner's new trial to the question of punishment and the denial of a re-trial of guilt denies the petitioner's constitutional rights.

Br. for Petitioner at 2, Brady v. Maryland, 373 U.S. 83 (1963). Brady theorized that the differential treatment of other defendants for whom suppressed evidence went to the jury, even though irrelevant to guilt, violated equal protection, and that due process required a new trial on guilt either (1) because the constitutional violation vitiated all proceedings from the moment of its occurrence before trial, or (2) because it would be improper to speculate on whether the jury might have considered the evidence on guilt, even if improperly so. *See* Br. for Petitioner at 5-6. The Supreme Court characterized these arguments as espousing a "sporting theory of justice" -- *i.e.*, one assuming that the jury might have flouted the court's instructions -- and rejected it. 373 U.S. at 90; *see* United States v. Agurs, 427 U.S. 97, 108-09 (1976).

"holding" of the Court was entirely unnecessary to its opinion; the Maryland Court of Appeals had held that "there was a duty on the State to produce the confession of Boblit that he did the actual strangling or at least to inform counsel for the accused of its existence," 226 Md. at 427, 174 A.2d at 169, and Maryland had not appealed that holding. And for no reason discernible in the opinion, Justice Douglas' formulation introduced the words "upon request." Possibly he had in mind the federal common law rule against discovery in criminal cases, but if so he did not mention it. Neither *Pyle v. Kansas*, nor the Third Circuit cases applying the *Pyle* rule, nor the Maryland opinion following them, turned on the presence or absence of a request. Instead, these opinions focused on either the conduct of the prosecutor or the exculpatory quality of the evidence. The existence of a request is mentioned in none of the Maryland opinions addressing the due process issue, *see Brady v. State*, 222 Md. 442, 444-45, 160 A.2d 912, 914 (1960); *Brady v. State*, 226 Md. 422, 427-30, 174 A.2d 167, 169 (1961), and is discernible only by reference to the Supreme Court record.[7]

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7. *See* Record at 24-25, Brady v. Maryland, 373 U.S. 83 (1963):

> 8. Had you ever requested from the State's Attorney the copies of statements made by Boblit? A. Not in that phraseology. What I asked him for was -- I asked him had he made any confessions.
>
> 9. You asked him who had made any confessions? A. Both of them [Brady and Boblit].
>
> 10. You did? A. And he said "yes" and I said that I'd like to have them. And I sat in his office one day and he gave me -- I imagine three or four on each side. . . .
>
> 13. . . . [W]hen you asked [the prosecutor] for a -- the statements by the various defendants, [did] he show[] you that one [of Boblit, naming Boblit as the strangler]? A. No, he did not.

Justice Douglas' formulation referred to "materiality" as well as to the defendant's request. The materiality requirement is consistent with the analysis in pre-*Brady* case law, *e.g.*, *United States ex rel. Thompson v. Dye*, 221 F.2d at 765, and with the provision in Fed. R. Crim. P. 52(a) that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." In *Giglio v. United States*, 405 U.S. 150 (1972), the Court held that nondisclosure of a promise of leniency made to a key witness was material, since it could have affected the jury's assessment of that witness' testimony. "A new trial is required," wrote Chief Justice Burger, if "'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . .'" *Id.* at 154, quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959). Significantly, in *Giglio* the Supreme Court made no mention of the request feature of Justice Douglas' *Brady* formulation.

Meanwhile, however, among prosecutors Justice Douglas' choice of words was producing a reaction he probably neither intended nor anticipated. Prosecutors began to assume that except in the most egregious circumstances, such as the knowing use of perjured testimony, they had no obligation to disclose arguably exculpatory evidence in the absence of a request, and that they could decide for themselves the materiality of such evidence. These practices led most lower federal courts to hold that the disclosure obligation -- now generally identified as a "*Brady*," rather than a *Pyle v. Kansas*, obligation -- existed even in the absence of a request. *See United States v. Hibler*, 463 F.2d 455, 459 (9th Cir. 1972); *Levin v. Clark*, 408 F.2d 1209, 1210-12 (D.C. Cir. 1968); *United States v. Poole*, 379 F.2d 645, 649 (7th Cir. 1967); *Levin v. Katzenbach*, 363 F.2d 287, 290 (D.C. Cir. 1966); *Barbee v. Warden*, 331 F.2d 842, 845-46 (4th Cir. 1964); *United States ex*

rel. Meers v. Wilkins, 326 F.2d 135, 137 (2d Cir. 1964); *Simms v. Cupp*, 354 F. Supp. 698, 700-01 (D. Ore. 1972); *Clements v. Coiner*, 299 F. Supp. 752, 758 (S.D.W. Va. 1969). In *United States v. Keogh*, 391 F.2d 138, 147 (2d Cir. 1968), however, Judge Friendly suggested that the absence of a request was relevant to the determination of materiality.

In *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972), the Supreme Court reiterated *Brady*'s holding that when a request for material evidence is made, the suppression of such evidence favorable to the accused violates due process. Because in *Moore* a request had been made, the Court had no occasion to determine whether Justice Douglas' reference to a request purported to narrow the rule of *Pyle v. Kansas* or to affect the materiality requirement when no such request is made.

There matters stood when the Supreme Court decided *United States v. Agurs*, 427 U.S. 97 (1976). In *Agurs*, a federal prosecutor defended his failure to disclose the criminal record of the victim of a homicide on the ground that there had been no specific request for it. The Circuit Court for the District of Columbia Circuit, holding that the information was nevertheless relevant to the defendant's self-defense theory, ordered a new trial. Before the Supreme Court, the United States took the position that *Brady* and *Moore* had narrowed *Pyle* by making a specific request a prerequisite to the prosecutor's due process obligation to disclose material evidence favorable to the accused. Br. for Petitioner at 24-33, *United States v. Agurs*, 427 U.S. 97 (1976). This position the Court rejected, thereby rehabilitating that portion of *Pyle v. Kansas* holding that the prosecutor has a duty to disclose material evidence favorable to the accused, even in the absence of a request. However, the *Agurs* Court refined the materiality requirement, developing for the first

time a three-level test for materiality depending on whether a request has been made.

Under *Agurs*, if the prosecutor knew or should have known of perjured testimony, whether or not a request has been made, then the disclosure of this fact is required by due process if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* at 103 (footnote omitted). The standard for the use of perjured testimony, derived from *Giglio*, *supra*, is similar to, and evidently more lenient than, the well-known Rule 33 standard applicable to perjured testimony enunciated in *Larrison v. United States*, 24 F.2d 82, 87 (7th Cir. 1928) (whether "the jury might have reached a different conclusion").[8]

If a specific request has been made, then the non-disclosure of evidence favorable to the accused violates due process if a "substantial basis for claiming materiality exists." 427 U.S. at 106; *see United States v. McCrane*, 547 F.2d 204, 205 (3d Cir. 1976) (per curiam) (on remand from the Supreme Court in light of *Agurs*). As this court held in *McCrane*:

> *Agurs* established a less stringent test to be applied when the defense requests specific evidence. In that situation, if . . . a "substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond

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8. *See* United States v. Meyers, 484 F.2d 113, 116 (3d Cir. 1973); Newman v. United States, 238 F.2d 861, 862 n.1 (5th Cir. 1956); Gordon v. United States, 178 F.2d 896, 900 (6th Cir. 1949), *cert. denied*, 339 U.S. 935 (1950); United States v. Flynn, 131 F. Supp. 742, 743 (S.D.N.Y. 1955); United States v. Hiss, 107 F. Supp. 128, 136 (S.D.N.Y. 1952), *aff'd*, 201 F.2d 372 (2d Cir.), *cert. denied*, 345 U.S. 942 (1953). *But see* United States v. Stofsky, 527 F.2d 237, 245-47 (2d Cir.), *cert. denied*, 429 U.S. 819 (1975).

> either by furnishing the information or by submitting the problem to the trial judge."

547 F.2d at 207 (quoting *Agurs*, 427 U.S. at 106). "When the prosecutor receives a specific and relevant request," the *Agurs* Court added, "the failure to make any response is seldom, if ever, excusable." 427 U.S. at 106.

If the defense made no request, or tendered one couched in general terms such as "all *Brady* materials," the non-disclosure of evidence favorable to the accused violates due process if the undisclosed evidence suffices to establish a reasonable doubt. All three of these standards, of course, are subject to the over-arching constitutionally harmless error standard of *Chapman v. California*, 386 U.S. 18, 24 (1967).

Since the *Agurs* Court "refined" the law with respect to the prosecutor's duty to disclose exculpatory materials, replacing the rather clear test of *Pyle* with the foregoing materiality standards, this court has been faced with annoying frequency with gamesmanship by some prosecutors with respect to the duty to disclose. Our recent opinion in *United States v. Starusko*, 729 F.2d 256 (3d Cir. 1984), outlines the problems we have encountered with the operation of the *Agurs* tests for materiality. It seems clear that those tests have a tendency to encourage unilateral decision-making by prosecutors with respect to disclosure. As we explain further below, the root of the problem is the prosecutor's tendency to adopt a retrospective view of materiality. Before trial the prosecutor cannot know whether, after trial, particular evidence will prove to have been material. *See Agurs*, 427 U.S. at 108; *Starusko*, 729 F.2d at 261. Following their adversarial instincts, some prosecutors have determined unilaterally that evidence will not be material and, often in good faith, have disclosed it

neither to defense counsel nor to the court. If and when the evidence emerges after trial, the prosecutor can always argue, with the benefit of hindsight, that it was not material.

It is equally clear that such self-help has the inevitable consequence of producing both appeals such as this and collateral attacks under 28 U.S.C. § 2255 (1982). Moreover, as we noted in *Starusko*, we are left with the nagging concern that material favorable to the defense may never emerge from secret government files. *Starusko*, 729 F.2d at 265. Our experience since *Agurs* suggests that its "refinement" of the due process requirements of *Pyle v. Kansas* as interpreted on occasion by prosecutors pays too much deference to the federal common law policy of discouraging discovery in criminal cases, and too little regard to due process of law for defendants in those cases.

This case is a good example of the conduct which the *Agurs* formulation encourages. The prosecutor, despite a specific request, withheld the Wille immunity agreement, well knowing that if the defendants should learn of it, he still could argue with the benefit of hindsight that it was insufficiently material. At oral argument the prosecutor conceded that before trial he simply satisfied himself that the evidence probably would not prove to be material. In cases where counsel has not been astute enough to make a specific request, the risk to the prosecution from nondisclosure is even less, indeed, nonexistent.

But while our superiors in this hierarchial system are free to reconsider the wisdom of the gamesmanship encouraged by the *Agurs* materiality standards, we are not. Thus we must turn to the task of deciding whether, in the words of that case, either defendant had a "substantial basis for claiming materiality." 427 U.S. at 106. We approach that task mindful that, as the *Agurs* Court noted, "[w]hen the prosecutor receives a

specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Id.* If we conclude that a "substantial basis for claiming materiality" existed, then we must determine whether the non-disclosure of the Wille immunity agreement was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967).

B. *Application to this Case*

1. *Admissability of the Wille agreement.*

In order to be material, evidence suppressed must have been admissible at trial. *Brady*, 373 U.S. at 89-90. The government contends that the Wille immunity agreement is immaterial because it could not have been used for impeachment purposes. The government's theory is that the agreement does not pertain to Wille's testimony about the diesel fuel excise tax fraud, but to testimony about a separate but simultaneous check-kiting scheme.

Pflaumer hired Wille in June of 1978 as a comptroller for WHP. At that time, WHP had recently merged with a second trucking firm, C & R Transport Co., to form a third corporation, KMA Leasing, Inc. These three companies and a fourth, Burgmeyer Bros., Inc., all operated out of the WHP office. Charles Gillan served as President of WHP and Burgmeyer. In 1978, Burgmeyer had accumulated substantial federal tax liabilities. In order to satisfy cash flow needs, Pflaumer, Gillan and Wille allegedly operated an elaborate check-kiting scheme between KMA Leasing and Burgmeyer. That scheme was investigated by the United States Attorney's Office. The government claims that the grant of immunity to Wille applied to that investigation alone, and was therefore irrelevant. Fed. R. Evid. 402.

We hold that the Wille agreement was admissible to

impeach. The agreement is not specific on the subject matter of the government's investigation. It refers simply to "the federal investigation into certain activities of Charles Gillan and others during the period between June 2, 1978 and December, 1979." The government concedes that Pflaumer is one of the "others" to which the agreement refers. Both schemes arose out of cash flow deficiencies encountered by Pflaumer's firms as a result of tax liabilities. Both were under investigation by the same persons at the same time. Wille was not privy to the government's investigative files, and need not have known that in the government's mind they were separate. Certainly the government's artful phrasing of the agreement suggests that if Wille refused to cooperate in either of the investigations, he would be in breach of his undertaking for the immunity grant. Indeed, when the government advanced this argument, the trial court expressed skepticism:

> MR. COLE: I believe the immunity he refers to had to do with the check cashing scheme.
>
> THE COURT: In his own mind, in cross examination, if you were defense counsel wouldn't you want to ask him the question: weren't you immunized on a previous occasion. And the answer had to be, yes.

App. at 1600-01.

We share the trial court's skepticism. Clearly defense counsel could have used the agreement in cross-examination of Wille. Any effort by the government to establish that the agreement meant less than it said would at best have gone to the weight that the jury might have given it for impeachment purposes. Thus we reject the government's contention that it withheld inadmissible evidence.

2. *Defense knowledge of the agreement*

The government also urges that the Wille agreement is not *Brady* material because defense counsel "knew or should have known of it." There is no record support for the contention that either the defendants or counsel knew of the agreement. During post-trial proceedings, defense counsel testified under oath that he first learned of the Wille agreement after trial from another attorney, and that testimony was accepted as a fact. Nothing in the record suggests that either defendant knew of the agreement and withheld the information from his own counsel. The government could have, but did not, produce Wille to testify whether he had in fact disclosed the immunity agreement to his employer. Thus, the testimony of Pflaumer's counsel that he learned of the agreement after the verdict is uncontradicted.[9]

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9. The district court suggested that because Pflaumer was present during post-trial hearings and chose not to testify -- "thereby denying the government an opportunity to cross-examine him on [his knowledge]." App. at 1673 -- an inference might be drawn from his refusal to testify that Pflaumer in fact knew of the Wille agreement. Pflaumer instead submitted an affidavit attesting that, until counsel had informed him of the fact after his conviction, he was unaware that Wille had entered into an immunity agreement with the United States. App. at 1654.

We need not decide the somewhat difficult questions whether, when the defendant submits an affidavit attesting to lack of knowledge, his refusal to testify during a post-trial *Brady* hearing can be taken as substantive evidence of knowledge, *cf.* Griffin v. California, 380 U.S. 609, 613-15 (1965) (comment on refusal to testify at trial burdens privilege against self-incrimination), or whether his submission of an affidavit constitutes a waiver of the privilege against self-incrimination, *cf.* Brown v. United States, 356 U.S. 148, 154-55 (1958), or whether such a waiver was voluntary, *see* Minnesota v. Murphy, 104 S. Ct. 1136, 1143 (1984), or which party has the burden of establishing knowledge or non-knowledge. Even if Pflaumer's post-trial decision to submit an affidavit rather

There is also no evidence that the defendants "should have known" of the Wille agreement.[10] More importantly, however, it is not the law that exculpatory evidence in the government's file is not *Brady* material if the defendant might have uncovered it through independent sources. That position was advanced by the United States and rejected by the Supreme Court in *Agurs*. There the government argued that certain prior convictions were not *Brady* material in part because they were public records, and therefore ascertainable by independent investigation. The Court rejected that view, applying the applicable materiality standard despite the government's argument that defense counsel should have known of the records by virtue of their public status. *See* 427 U.S. at 111-14. Otherwise, the Court reasoned, "there would be no special significance to the prosecutor's obligation to serve the cause of justice." *Id.* at 111. It is simply not the policy of *Brady* to encourage pre-trial guessing games over whether the defendant might have an independent source for suppressed exculpatory evidence. The issue need not detain us, however, since there is no evidence in the record suggesting that defendants should have known of the secret immunity agreement.

3. *Materiality*

Finally, we must determine whether "a substantial basis for claiming materiality exists." 427 U.S. at 106.

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than to testify could be taken as substantive evidence -- a point on which we express no view -- that would simply be insufficiently probative to establish his knowledge.

10. During post-trial proceedings, the government argued that Pflaumer must have known of the Wille agreement because he must have known that Wille had given testimony in other proceedings relating to Burgmeyer Brothers. App. at 1605-06. Even if true, such knowledge would not have alerted Pflaumer to an immunity agreement.

We hold that defense counsel has a substantial basis for claiming the materiality of evidence impeaching the truthfulness of a prosecution witness when, viewed prospectively as the prosecutor views the evidence before trial, the testimony of the witness incriminates the defendant, and the impeaching evidence significantly impairs the incriminatory quality of that testimony. We so hold because the impeachment of an incriminating witness with significant evidence attacking the truthfulness of his testimony "might affect" the jury's assessment of reasonable doubt and thereby affect the outcome of the trial. *See Agurs*, 427 U.S. at 104. Thus, when the government has evidence in its files that serves to impeach a prosecution witness, and when, as here, a specific request for that evidence is made,[11] then due process requires the government to disclose the evidence if, viewed prospectively, the witness incriminates the defendant at trial and the impeaching evidence significantly impairs the incriminatory quality of the testimony. A new trial must be granted if this standard is violated and if, viewed retrospectively against the totality of the circumstances, the error is not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). Any doubt about whether impeaching evidence significantly impairs the believability of an incriminatory witness should be resolved by the trial court.

Thus, we reject the government's invitation to speculate on whether or not, or in what particular fashion, trial counsel might have impeached the witness in question.[12] The test for *Brady* material

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11. A request for "all impeachment evidence," of course, like a request "for all *Brady* materials," is not a specific request.

12. The government argues that we should affirm because we can find that Pflaumer's counsel would not have attempted to

must be capable of application by the prosecutor before trial, and neither the prosecutor before trial nor we from this appellate perspective are capable of speculating on the particular manner and degree of impeachment. As we discuss below, the agreement was clearly usable in a significant manner to impeach the truthfulness of Wille's testimony. Provided that Wille was an incriminating witness, which we also address below, that fact gives rise to a "substantial basis for claiming materiality."

Similarly, we decline the invitation to speculate with hindsight on what the jury's reaction to the agreement "might have been" in assessing the prosecutor's duty to disclose exculpatory evidence. Neither we from our appellate position nor the prosecutor before trial can decide these imponderables. If the *Brady* test is to work, it must be capable of prospective application by the prosecutor before trial. The standard to be applied by the prosecutor, therefore, cannot depend on

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impeach Wille. The reason advanced in support of that proposed finding is that had Wille been confronted with the immunity agreement, the door would have been opened for the prosecutor to refer to the check-kiting scheme and Pflaumer's involvement in it. Even if we were permitted to speculate in this fashion, that suggestion would not have appeal. The defendants could have exposed the immunity agreement and Wille's favorable treatment under it without revealing the details of the underlying check-kiting scheme. Any mention by the prosecution of Pflaumer's role in the check-kiting scheme would have been inadmissible under Fed. R. Evid. 404(b) and 405(b), and would almost certainly have been excluded under Fed. R. Evid. 403. Only in the unlikely event that the defendants themselves had probed Pflaumer's role in the check-kiting scheme would the risk suggested by the government have arisen. Of course, these difficulties highlight the hazards of hypothesizing about the particular course of events that may have ensued at trial had the prosecutor disclosed exculpatory evidence.

considerations capable of ascertainment if at all only after the fact. Speculation of this kind simply invites the pre-trial gamesmanship with which this court is becoming all too familiar. Hence *Agurs* speaks in terms of "a substantial basis for claiming materiality," a standard capable of prospective application. Any uncertainty about what evidence is covered will be narrowed by the specific request. If the prosecution has any doubts, it should turn the contested material over to the trial court for a pre-trial *Brady* ruling. What we can no longer tolerate is the prosecutor's guess before trial that the evidence after trial will not prove to have been material, and the consequent decision to conceal it even from the trial court. As Judge Aldisert recently put it, "[t]he 'game' will go on, but justice will suffer." *Starusko*, 729 F.2d at 265.

We do not agree with the suggestion in the dissent that the *Agurs* "test" for specific requests is whether the evidence "might have" affected the jury's verdict, and that this "test" is to be analyzed retrospectively in light of the cumulative evidence adduced at trial, the possible intensity of impeachment, the possible impact on the jury, and so forth. The dissenting opinion misreads *Agurs* and this court's decision in *United States v. Higgs*, 713 F.2d 39 (3d Cir. 1983), and confuses the prospective *Brady* analysis which the prosecutor must apply before trial with the constitutionally harmless error determination which must be made after trial. The relevant passage of *Agurs* states:

> A fair analysis of the holding in *Brady* [a specific-request case] indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.

427 U.S. at 104. We agree that the concern in such

cases is whether the suppressed evidence might have affected the outcome of the trial. But this observation does not propound a "test" for the specific-request case. Indeed, *Agurs* contains no such holding, since in that case there was no specific request. The metric articulated in *Agurs* for analyzing specific-request cases is the standard, adopted by this court in *McCrane*, of whether "a substantial basis for claiming materiality exists." 427 U.S. at 106.[13] That standard must be capable of reasonably certain application by the prosecutor before trial. Our holding gives content to the standard in a rule reasonably capable of prospective application by the prosecutor. Of course, a retrospective analysis of the totality of the case does enter the picture when, in this as in all cases, we determine whether any constitutional error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). We address that question in Part IV B 3 a *infra*.

Finally, we reject any *per se* standard of materiality. The standard is whether, on the facts of each case, "a substantial basis for claiming materiality exists." Therefore, we turn to consider whether Wille's testimony incriminated either Pflaumer or Oxman and whether the Wille immunity agreement significantly impaired its incriminatory character. We must further determine whether any error is harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24.

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13. Nor can we agree that the standard applied here is inconsistent with the language of *Higgs*. We apply here verbatim the standard for specific-request cases adopted by this court in United States v. McCrane, 547 F.2d 204, 205 (3d Cir. 1976) (per curiam) (on remand from Supreme Court in light of *Agurs*), on which this court in *Higgs* relied. The *Higgs* court made no effort to flesh out the materiality standard of *McCrane* because the government in *Higgs* had conceded that the requested information was *Brady* material. 713 F.2d at 43.

a. Pflaumer

i) Duty to disclose

(a) Incriminatory witness

In determining whether Wille's testimony incriminated Pflaumer we must examine the evidence implicating Pflaumer in the excise tax fraud scheme. That scheme originated when Oxman, a commission salesman for Park Oil, arranged through John McCullough, the late president of a Philadelphia labor union, to meet with Pflaumer in an effort to obtain the fuel oil business of Pflaumer's Philadelphia-based enterprises. Jock, Oxman and McCullough attended the initial meeting, but only Jock testified about it. According to Jock, he explained to Pflaumer that he could not offer better prices than those charged by Arco and Gulf "other than if we went with the tax-angle routine." Jock agreed to report as delivery destinations "[w]hatever they told us to put on the invoice[s]." App. at 136. Jock also testified that Pflaumer instructed him to explain the "tax-angle routine" to Gillan. App. at 138-39.[4] Jock's testimony implicated Gillan and indicated that Oxman and McCullough were receiving "commissions" on WHP sales. While the scheme was in operation, WHP fell behind in payments. Jock called Pflaumer and told him he could not pay commissions to Oxman and McCullough because he was not getting paid for his product. App. at 150. Jock also stated that late in 1979, after the date of the last mailing, Pflaumer engaged in efforts to conceal the tax fraud from state auditors by destroying fuel invoices.

During cross-examination, questioning by defense counsel suggested that Jock had inculpated Pflaumer in order to obtain Jock's release from prison. The examination established that the prosecution had orchestrated Jock's transfer to Eglin prison camp, a

minimum security prison -- characterized by Jock as "a country club," App. at 270 -- obtained a reduction in sentence making Jock eligible for parole immediately, App. at 272, and recommended favorable treatment from the Parole Board, which Jock received. App. at 274. As a consequence, Jock -- who had at that time served only five months of a four-year prison term for wire fraud -- was released on parole after only three additional months' incarceration, two of which Jock served "at a half-way house in Palm Beach." App. at 275. The import of Jock's cross-examination was that the government had paid dearly for his testimony.

In order to bolster Jock's testimony against Pflaumer, the government sought to establish that Pflaumer had a daily role in WHP's financial affairs. Wille was one such prosecution witness. Wille testified to Pflaumer's role in WHP as follows:

> Q. What was Mr. Pflaumer's involvement in Wm. H.P., Inc.?
>
> A. He pretty much directed the company. His primary interest was in the operation of the brewery, Schmidt Brewery. He directed it from the financial end. From the part that I saw he directed the accounts payable, what was to be paid and the girl who wrote the checks, checked with him about what was to be paid.
>
> *Q. What would you say the extent of his involvement was in the financial end of the trucking company? . . . Could the check go out of there without Mr. Pflaumer's knowledge?*
>
> *A. No. That was his principal involvement on the financial end.*
>
> Q. Was there a cash flow problem with the company while you were there?

.A. Yes.

Q. Did it require Mr. Pflaumer's constant vigilance?

A. The office manager would check with him with respect to any check that was to be written if she did not think that he was aware that the check was going to be written that day.

Q. And did you peronally talk to Mr. Pflaumer from time to time about the financial end of the trucking company?

A. Yes.

Q. On a daily basis?

A. Probably not on a daily basis but several times a week.

Q. Did you observe the office manager talking to Mr. Pflaumer on a daily basis?

A. Oh, yes; usually several times a day.

App. at 859-61 (emphasis added). The government knew long before trial that Wille would testify to these matters by virtue of several FBI interviews with him.

Through Wille, therefore, the government established that WHP issued no checks without Pflaumer's approval and that Pflaumer conferred several times daily with the WHP office manager. In contrast, Pflaumer's defense was that Gillan and Hill ran WHP, while he spent most of his time at the brewery and had little involvement in the day to day financial affairs of WHP.

Thus, Wille's testimony rebutted a principal defense on which Pflaumer relied. A significant portion of the government's case consisted of establishing that Pflaumer had a daily role in WHP's financial affairs. The government argued that Pflaumer's assertion that

he had no involvement in the affairs of WHP was false, and that the jury might infer that Pflaumer must have known of the scheme. Certainly, therefore, Wille's testimony incriminated Pflaumer. If believed, it established that Pflaumer was sufficiently involved in the affairs of WHP to have direct control over every check that the company issued. The jury might infer, as the government argued, that Pflaumer must have known of the tax scheme. Consequently, we hold that Wille's testimony incriminated Pflaumer in the tax fraud scheme and that the prosecutor before trial had ample basis for knowing that it would do so.[14]

In ruling that the Wille immunity agreement was immaterial, the trial court pointed out that the testimony of Jock and Luciano suggested Pflaumer's involvement. The court then concluded:

> Clearly, therefore, even if the defendants had been able to impeach Wille by virtue of the

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14. The government maintains that Wille's testimony was necessary only "so that he could name the person from whom he received his orders." Br. at 20. This explanation is simply implausible. That person, as Wille testified, was Charles Gillan. App. at 861-66. Gillan, however, had already pleaded guilty. No purpose was served by calling Wille solely to inculpate Gillan. Nor was it necessary to establish that Wille took orders from Gillan "for completeness," as the government suggests. If anything, such testimony detracted from the government's case against Pflaumer, since it implied -- as Pflaumer contended -- that Gillan had orchestrated the scheme.

At oral argument, the government contended that Wille's name had been included in the witness list before Gillan had pleaded guilty and, indeed, that its inclusion may have contributed to Gillan's decision to plead guilty. While this explanation may make sense of the government's assertion in its brief that Wille's testimony was necessary to inculpate Gillan, it does not explain why Wille was called even after Gillan had pleaded guilty. And, of course, it ignores that portion of Wille's testimony that directly inculpated Pflaumer.

> immunity agreement, there was sufficient other evidence implicating Mr. Pflaumer.

App. at 1673. This ruling is legal error. The test is not whether, viewed in retrospect, there was sufficient additional evidence such that, without Wille's testimony, the case could have been submitted to the jury. Under *Agurs*, when a specific request for evidence is made, the standard is whether the defendant has a substantial basis for claiming materiality. Evidence significantly impeaching the truthfulness of an incriminating witness gives rise to a substantial basis for claiming materiality. *United States v. Higgs*, 713 F.2d at 43; *United States v. McCrane*, 547 F.2d at 206-08. Thus, we turn to whether the Wille immunity agreement was significant impeachment evidence.

(b) Significant impeachment evidence

We hold that the Wille immunity agreement was significant impeachment evidence, and that the prosecutor had a sufficient basis for appreciating this fact before and during trial. The government had already conferred immunity on two prosecution witnesses and extended substantial benefits to them. The disclosure of yet a third immunity agreement, and of the extension of additional benefits, gave the prosecutor a sufficient basis for concluding that the Wille immunity aggrement was significant impeachment evidence. The prosecutor should have appreciated that the disclosure of the existence of substantial benefits conferred on all of the government's principal incriminatory witnesses might have led the jury to doubt their truthfulness. This gave rise to a substantial basis for claiming materiality. Therefore, the question whether the Wille immunity agreement was *Brady* material should at least have been submitted to the trial court for a pre-trial *Brady* ruling.

(ii) Harmless beyond a reasonable doubt

We have held that due process required that the government bring the Wille agreement to the attention of the trial court at least. A new trial is required, however, only if the non-disclosure of the Wille immunity agreement was not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). This determination requires an overview of the totality of the case against Pflaumer.

Aside from Jock's strong testimony about the initial meeting, his testimony about the commissions paid to Oxman and McCullough, and his testimony about Pflaumer's interest in concealment, there is very little direct evidence of Pflaumer's involvement. The testimony of Jock's son Michael corroborated WHP's involvement, but tended to inculpate Pflaumer only in an ambiguous passage referring to a price increase to cover federal excise taxes.[15] Peter Cordua, Michael Jock's accountant, also testified to an ambiguous conversation with Pflaumer concerning an audit of fuel

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15. Michael Jock testified:

A. I told him [Pflaumer] [that] the [fuel] price would have to be increased.

Q. Why did you tell him that?

A. I would have to pay the four cents.

Q. Had you been charging him the four cents tax up to that point.

A. No.

Q. What did he say when you said that?

A. He said deduct my regular price four cents and add that to it and the price will come out the same.

App. at 421. The jury might have inferred from Pflaumer's response that he knew that federal excise taxes were not being paid.

deliveries in Pennsylvania. App. at 567. In closing, the government argued that because Pflaumer expressed no surprise at Cordua's reference to "Pennsylvania" deliveries, the jury might infer that Pflaumer knew some deliveries had falsely been reported has having occurred outside of Pennsylvania. App. at 1324.[16]

John Luciano also testified to one conversation with Pflaumer. Luciano stated that he had falsified invoices at the direction of Ray Hill, whom the jury acquitted. Asked about a conversation with Pflaumer, Luciano responded:

> A. He asked me if I worked everything out with Ray [Hill] and I said I did.
>
> He said to make sure the stuff was good because he did not want any crap going into his trucks creating a lot of problems for him.
>
> I told him we bought most of it from Exxon.
>
> He said, keep your nose clean and don't f--- up. We have a good arrangement.

App. at 597. The jury might have inferred from Pflaumer's allusion to Hill and to "a good arrangement" that Pflaumer was aware of the tax scheme. Luciano testified as well that Oxman once told him he had spoken to "Billy" -- referring to Pflaumer -- "and [that] everything looked fine." App. at 591.

Lastly, a WHP accountant testified that Pflaumer's signature appeared on several falsified tax returns.

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16. This inference drawn from Pflaumer's silence was a weak one. If all the deliveries were to Pennsylvania, Pflaumer may simply have observed nothing unusual in referring to them as "Pennsylvania deliveries." It would have been more remarkable had the accountant referred to a list of *Maryland* or *New Jersey* deliveries and elicited no surprise from Pflaumer.

App. at 875-79. The accountant did not, however, indicate that he was aware of Pflaumer's knowledge of the scheme or his role in preparing the returns. And a Pennsylvania tax auditor testified to conversations with Pflaumer in 1980 in which Pflaumer had stated that the auditor had in his possession all of the available fuel invoices. App. at 951. In fact, many invoices had been destroyed. These conversations could be taken as evidence of concealment by Pflaumer.

This evidence, coupled with the foregoing testimony of Frank Jock and Wille, constituted the principal evidence of Pflaumer's involvement.[17] We do not agree that in light of this evidence, the error regarding Wille's immunity agreement was harmless beyond a reasonable doubt. First, as we noted earlier, had Pflaumer's defense counsel been in possession of the immunity letter, he would have been able to argue that Jock had received valuable benefits in exchange for testimony, that Luciano, who corroborated Jock, had also received benefits, and that Wille, who rebutted Pflaumer's defense, had received benefits as well. Consequently, the jury would have perceived Wille as the third government witness whose testimony the

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17. The government maintains that additional witnesses further implicated Pflaumer. Br. at 21 n.5. None of the testimony cited, however, added significantly to the evidence reviewed above. Pflaumer's secretary, for example, Jacqueline Branson -- a defense witness -- testified that the meeting of Pflaumer, Oxman, Frank Jock, and McCullough had occurred. App. at 1251-52. The existence of the meeting, however, had already been established. Branson did not testify to the content of the conversations, nor could she have done so, for she had not been present. Delores Lyons, the WHP office manager, testified that from time to time she and Pflaumer had had discussions about the "financial end of the business." App. at 734. Lyons did not, however, testify that these conversations inculpated Pflaumer. Wille's testimony indicated that the conversations had occurred and established more strongly than did Lyons' Pflaumer's financial role in the company.

prosecution had obtained in exchange for beneficial treatment. The jury, which in acquitting Hill had apparently discredited Luciano, who most directly incriminated Hill, might well have been influenced by the fact that the principal witnesses who incriminated Pflaumer all were the beneficiaries of prosecutorial largess.

Second, Pflaumer's impeachment of Frank Jock invited the jury to seek corroboration from other witnesses. Wille was one such corroborating witness, and -- in light of the weakness of the corroborating testimony of Michael Jock, Cordua, and Luciano -- an important one. Wille was the only witness who testified that Pflaumer exerted day-to-day control over the financial affairs of WHP, thereby affording a basis for inferring that Pflaumer must have known of the scheme. The government's suggestion that Wille's testimony "did not suggest that Pflaumer was aware of the fraudulent scheme," Br. at 21, is simply erroneous. Effective impeachment of Wille might have undermined this impression.

Of course, the district court's assessment of the likelihood of the impact of non-disclosure on the outcome of the trial "is entitled to great weight." *United States v. Provenzano*, 615 F.2d 37, 49 (3d Cir.), *cert. denied*, 446 U.S. 953 (1980). *Agurs* requires that we give deference to the trial court's "firsthand appraisal of the record" when that appraisal is "thorough" and "reasonable." 427 U.S. at 114. The district court's anaylsis, however, does not satisfy this standard. The entirety of the court's assessment of the weight of the evidence consists of the following paragraph:

> Frank Jock testified that he entered into a conspiracy with Mr. Pflaumer. John Luciano also testified as to Mr. Pflaumer's involvement. Indeed, defendants' memorandum in support of

> motion for judgment of acquittal acknowledges the inculpatory nature of their combined testimony. Defendants' memorandum states "Mr. Luciano does not directly inculpate Mr. Pflaumer to the same degree that Mr. Jock does. . . ." (Memorandum of Defendants, In support of Motion for Judgment of Acquittal, pp. 7 and 8). Clearly, therefore, even if the defendants had been able to impeach Wille by virtue of the immunity agreement, there was sufficient other evidence implicating Mr. Pflaumer.

App. at 1672-73. This analysis is not adequate. First, unlike the trial court in *Agurs*, the district court did not "remain[] convinced of [Pflaumer's] guilt *beyond a reasonable doubt*." 427 U.S. at 114 (emphasis added). We cannot ascertain whether the court applied the *Chapman* standard of constitutionally harmless error. Second, the only testimony of Luciano inculpating Pflaumer was the single oblique suggestion that Pflaumer might have known of Hill's role and believed it "a good arrangement," and that Oxman had spoken to Pflaumer and believed that "everything looked fine." The court's notation that "John Luciano testified to Mr. Pflaumer's involvement" is not an informed assessment of the impact of this testimony. Rather than canvassing all of the relevant testimony and examining Wille's role in light of it, the district court relied on an inference from a statement in the defendants' post-trial memorandum. Such an inference does not substitute for an informed appraisal of the evidence in its totality. Because we cannot say that the trial court's "firsthand appraisal of the record was thorough and entirely reasonable," *Agurs*, 427 U.S. at 114, we are unable to defer to its assessment in this case. For these reasons, we cannot find the error harmless beyond a reasonable doubt.

Because the prosecutor withheld specifically requested information that might have been used to impeach significantly a witness who incriminated Pflaumer, and because the non-disclosure is not harmless beyond a reasonable doubt, Pflaumer is entitled to a new trial.

b. Oxman

Oxman's case differs from Pflaumer's in an important respect, for Wille's testimony in no way incriminated Oxman. Wille added nothing to the government's case against him. That case tied Oxman into the fraudulent scheme in which Gillan, Jock, and later Luciano were key participants. Because Wille in no way incriminated Oxman, the prosecutor did not breach a duty to disclose the Wille immunity agreement to him.

Oxman also contends that he was prejudiced by the tardy disclosure of material impeaching Luciano. We have frequently condemned the tardy disclosure of *Brady* material. *See Starusko*, 727 F.2d at 264. We repeat that admonition. But because Oxman's counsel obtained the materials in time to conduct a vigorous cross-examination of Luciano, he was not prejudiced by this tardy disclosure. *See Starusko*, 729 F.2d at 262; *United States v. Higgs*, 713 F.2d 39, 44 (3d cir. 1983). Oxman is not entitled to a new trial.

IV.

Conclusion

Because the trial court erred in rejecting Pflaumer's request for a charge that the jury must find that he joined the conspiracy prior to the last mailing, and because the government withheld specifically requested *Brady* material, his conviction must be reversed, and the case remanded for a new trial. The judgment of sentence in Oxman's case will be affirmed.

SLOVITER, *Circuit Judge*, dissenting.

The difficult issue before us, and one with which the Courts of Appeals have struggled since *United States v. Agurs*, 427 U.S. 97 (1976), is the determination of the materiality of evidence that the prosecutor did not disclose in response to a specific request by defense counsel for *Brady* material.

In *United States v. Higgs*, 713 F.2d 39 (1983), *cert. denied*, 104 S. Ct. 725 (1984), this court summarized the *Agurs* decision as follows:

> In *Agurs* the Supreme Court analyzed the requirements of materiality in three different situations. First, where the prosecutor's case includes perjured testimony and the prosecution knew, or should have known of the perjury, the undisclosed information is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." 427 U.S. at 103, 96 S. Ct. at 2397. Second, where the defendant has made a specific request for information, any undisclosed information will be considered material if "the suppressed evidence might have affected the outcome of the trial." *Id.* at 104, 96 S. Ct. at 2398. Finally, when no request is made by the defendant or only a general request for *Brady* material is made, undisclosed information will be held to be material only if "the omitted evidence creates a reasonable doubt that did not otherwise exist." *Id.* at 112, 96 S. Ct. at 2402.

713 F.2d at 42. *See also United States ex rel. Marzeno v. Gengler*, 574 F.2d 730, 735-36 (3d Cir. 1978).

It is patent that under *Agurs*, as interpreted and reiterated in *Higgs*, the standard for materiality of the undisclosed evidence will be easiest to meet in the first situation, *i.e.*, where the prosecutor knowingly used

perjured testimony. This is not such a case. Nonetheless, the approach that the majority uses in reaching its ultimate conclusion that a new trial must be granted to Pflaumer mirrors the standard applicable when there has been use of perjured testimony, *i.e.*, "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." In effect, the majority has circumvented the test *Agurs* established for the situation, such as here, where the defendant made a specific request for the information, and that requires us to ascertain if "the suppressed evidence might have affected the outcome of the trial."

The majority accomplishes this by establishing the following steps: (1) requiring a determination of whether "a substantial basis for claiming materiality exists", Majority Typescript Op. at 39; (2) viewing such a determination of the import of the evidence prospectively, *id.*; (3) equating evidence that impeaches an incriminating witness with evidence that "might affect the outcome of the trial," thereby establishing a *per se* rule of materiality, *id.* at 39-40; and (4) utilizing the harmless error test, *id.* at 40.

As I will develop briefly below, I believe in each respect the majority has diverged from both the holding and the spirit of *Agurs*. Most significantly, by constructing this elaborate multi-step analysis, the majority has pretermitted the simple inquiry required by *Agurs* -- whether the undisclosed evidence was in fact material in the particular case.

1. To determine materiality under *Agurs*, the defendant here must show that the suppressed evidence "might have affected the outcome of the trial." The majority has instead devised a new standard, interpreting *Agurs* as requiring a determination whether "a substantial basis for claiming materiality exists." *See, e.g.*, Majority Typescript Op. at 39. This

language from *Agurs* has been taken and applied out of context. The full passage in which it appears in *Agurs* is:

> Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed *if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond* either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.

Agurs, 427 U.S. at 106 (emphasis added). This passage was directed to the "pretrial decision of the prosecutor," not the "post-trial decision of the judge." *Id.* at 108. Nothing in *Agurs* suggests that the inquiry into materiality in a specific request case can be transmuted into an inquiry whether, from the prosecutor's standpoint, there was "a substantial basis for claiming materiality". Either the undisclosed evidence was material, as defined in *Agurs*, or it was not.

2. In *Agurs*, the Court remarked on the "significant practical difference" between the prosecutor's pretrial decision whether the evidence must be provided to defendant and the judge's post-trial decision whether failure to provide the evidence requires a new trial. *Id.* As the Court pointed out, "the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." *Id.*

However, the majority's due process analysis views materiality from a prospective standpoint instead of retrospectively, as required. It says:

> We hold that defense counsel has a substantial basis for claiming the materiality of evidence impeaching the truthfulness of a prosecution witness when, *viewed prospectively as the prosecutor views the evidence before trial*, the testimony of the witness incriminates the defendant, and the impeaching evidence significantly impairs the incriminatory quality of that testimony.

Majority Typescript Op. at 39-40 (emphasis added). The majority's approach in viewing materiality prospectively is made explicit again in its discussion at Typescript Op. at 42. I believe this is plainly erroneous.

3. Despite the majority's insistence that it rejects any *per se* standard of materiality, that is precisely what it has fashioned, as is evident in the sentence quoted above and the one that immediately follows it in the majority opinion:

> [T]he impeachment of an incriminating witness with significant evidence attacking the truthfulness of his testimony "might affect" the jury's assessment of reasonable doubt and thereby affect the outcome of the trial.

Majority Typescript Op. at 40. In effect, the majority holds that almost any undisclosed evidence that may impeach an incriminating witness is, by definition, material. Most courts, including this one, have suggested that the standard of materiality should be more favorable to the prosecution for impeachment evidence than for directly exculpatory evidence. As we said in *United States v. McCrane*, "*Agurs*' applicability to the case at bar is subject to some doubt since we are concerned only with impeaching evidence." 547 F.2d at 205. *See United States v. Bracy*, 566 F.2d 649, 656 (9th Cir. 1977) ("[m]anifestly, a greater duty should be placed on a prosecutor to produce exculpatory evidence than to disclose evidence which could be used for

impeachment purposes only"), *cert. denied*, 439 U.S. 818 (1978). *See also United States v. Imbruglia*, 617 F.2d 1, 6-7 (1st Cir. 1980). I construe *Agurs* as directing the courts to ascertain materiality in fact, and the majority's approach, which cuts off the inquiry when the evidence arguably impeaches an incriminating witness, is inconsistent with that direction.

4. The majority's use of the harmless error test, while it nominally avoids a rule of automatic reversal, is out of place. The harmless error test is to be applied only after a constitutional error is established. Under *Agurs*, there has been no constitutional error if the undisclosed evidence was not material, 427 U.S. at 108.

Furthermore, the stringent harmless error test, even were it appropriate, is closer to the materiality standard where there has been knowing use of perjured testimony ("any reasonable likelihood that the false testimony *could have* affected the judgment of the jury," *id.* at 103 (emphasis added)) than where there has been failure to disclose in response to a specific request ("if the suppressed evidence *might have* affected the outcome of the trial," *id.* at 104 (emphasis added)).[1] As the Fifth Circuit has said, the "reasonable likelihood" standard of materiality for perjured testimony is "a brother, if not a twin," of the harmless error standard. *United States v. Barham*, 595 F.2d

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1. I have some difficulty in applying the statement in *Agurs* that "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." 427 U.S. at 109-110. If this sentence is not limited to the case where there was only a general request for exculpatory evidence, defendants' burden to prove materiality would be significantly increased. The context of this sentence in *Agurs* indicates that the Court was referring only to the general request situation, and hence I am not relying on this language to support the arguments made in the text.

231, 242 (5th Cir. 1979), *cert. denied*, 450 U.S. 1002 (1981). Although the distinction between the *Agurs* standards for materiality in the two situations referred to above may not be readily apparent until there is a closer examination of the language, it is apparent from the context that the Court intended to make it easier for the defendant to show materiality when the prosecution knowingly used perjured testimony than when it withheld evidence. Therefore, the majority's use of the harmless error standard in its inquiry as to materiality in this case, where there was no knowing use of perjured testimony, imposes a more difficult burden on the prosecution than did the *Agurs* Court.

Thus, I conclude that the majority's substitution of a splintered analysis of materiality in lieu of the one-step test enunciated in *Agurs* is wrong as a matter of law.

Furthermore, I believe the majority has given inadequate weight to the trial court's assessment of the evidence. In evaluating whether the evidence "might have affected the outcome of the trial," the appellate courts are required by *Agurs* to defer to the trial court's judgment of the evidence. The Court stated:

> [S]ince after considering [the undisclosed evidence] in the context of the entire record the trial judge remained convinced of respondent's guilt beyond a reasonable doubt, and since we are satisfied that his firsthand appraisal of the record was thorough and entirely reasonable, we hold that the prosecutor's failure to tender Sewell's record to the defense did not deprive respondent of a fair trial as guaranteed by the Due Process Clause of the Fifth Amendment.

427 U.S. at 114.

In this case, the trial court concluded that Wille's testimony had been "merely cumulative" and that

"even if the defense had been able to impeach Mr. Wille with the requested information, the outcome of the trial would have been the same." App. at 1672a. As the majority acknowledges, we are bound to give the trial court's evaluation of the evidence great weight. *E.g., United States v. Provenzano*, 615 F.2d 37, 49 (2d Cir.), *cert. denied*, 446 U.S. 953 (1980); *United States v. Librach*, 609 F.2d 919, 922 (8th Cir. 1979), *cert. denied*, 444 U.S. 1080 (1980); *Skinner v. Cardwell*, 564 F.2d 1381, 1388 (9th Cir. 1977), *cert. denied*, 435 U.S. 1009 (1978).

Although the majority purports to do so, it fails to give the necessary weight to the trial court's evaluation. Instead, it states the conclusory opinion that the analysis of the district court "is not adequate". Majority Typescript Op. at 55. Unlike the majority, I am unable to so characterize the opinion of the district judge, who heard all the witnesses and weighed the undisclosed evidence of Wille's immunity agreement against the incriminating testimony of Jock and Luciano. *See* App. at 1672a-73a.

I share the majority's concern about the prosecution's continued restrictive approach to *Brady* and *Agurs*. However, our inquiry must be a due process one focused on whether the trial was fair. We cannot use our displeasure with the prosecution as the only basis for awarding a new trial. I simply cannot conclude that the failure to disclose the information about the immunity agreement with Wille rose to a level that constituted a denial of due process.[2] Therefore, I respectfully dissent.

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2. I am not convinced by the majority's conclusion that the jury instruction was both erroneous and not harmless when viewed in its totality. I agree, however, that the issue is a close one. Under such circumstances, I believe that we should have the benefit of oral argument on that issue before reversing on that ground, particularly since both attorneys who argued were helpful in their presentation before this court. However, at the direction of this court, the oral argument was limited to the *Brady* issue.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

34-1033 UNITED STATES v. PFLAUMER, WILLIAM H.

The Petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *United States* v. *Bagley*, 473 U.S. ____(1985).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1532

UNITED STATES OF AMERICA

v.

WILLIAM H. PFLAUMER,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal No. 83-00113-01)

Argued April 6, 1984

Before: GIBBONS and SLOVITER, *Circuit Judges*
and MENCER, *District Judge**

(Opinion filed August 1, 1984)

On Remand from the Supreme Court
Submitted Under Third Circuit Rule 12(6)
August 5, 1985

Before: GIBBONS and SLOVITER, *Circuit Judges*
and MENCER, *District Judge**

(Opinion Filed October 9, 1985)

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* Hon. Glenn E. Mencer, United States District Court for the Western District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

The Supreme Court has vacated the judgment of this court which had reversed the convictions of William H. Pflaumer and remanded for a new trial for mail fraud, 18 U.S.C. § 1341 (1982), and conspiracy to commit mail fraud, 18 U.S.C. § 371 (1982), *see United States v. Oxman*, 740 F.2d 1298 (3d Cir. 1984), *vacated and remanded sub. nom. United States v. Pflaumer*, 53 U.S.L.W. 3914 (1985). The Court remanded the case to us for further consideration in light of *United States v. Bagley*, 53 U.S.L.W. 5084 (1985). Our consideration must be in two parts, first as to the prior decision on the issue of *Brady* material, and second as to whether a jury instruction held erroneous in our prior decision also infected Pflaumer's conviction on the substantive mail fraud charges.

I.

The Undisclosed Material

A.

When the matter was previously before us, the court, by a divided vote, concluded that Pflaumer was entitled to a new trial on his conviction of 21 counts of mail fraud and one count of conspiracy to commit mail fraud because, *inter alia*, "the government withheld specifically requested *Brady* [*v. Maryland*, 373 U.S. 83 (1963)] material." 740 F.2d at 1319. The undisclosed information at issue was that a government witness, Ralph Wille, who was implicated in a check-kiting scheme, had been given a promise of use immunity for his information and testimony "relative to the federal

investigation into certain activities of Charles Gillan [one of the co-defendants in this indictment] and others [conceded to include Pflaumer] during the period between June 2, 1978 and December 1979." 740 F.2d at 1301-02 n.3 (quoting agreement in full). Despite the government's contention that this related to a separate investigation into check-kiting, and not mail fraud, we previously held the agreement did not, on its face, show that it applied only to the check-kiting investigation, and therefore the agreement was admissible to impeach Wille.

The majority held that this was "significant impeachment evidence" and determined its materiality under *United States v. Agurs*, 427 U.S. 97 (1976), by applying a prospective analysis. The majority stated that "[t]he prosecutor should have appreciated that the disclosure of the existence of substantial benefits conferred on all of the government's principal incriminatory witnesses might have led the jury to doubt their truthfulness," and concluded that this gave rise to "a substantial basis for claiming materiality" of the use immunity agreement. 740 F.2d at 1317. We further held that this error was not harmless beyond a reasonable doubt. 740 F.2d at 1317-19. The government filed a petition for certiorari on this issue.

Thereafter, in *United States v. Bagley*, 53 U.S.L.W. 5084 (July 2, 1985), the Supreme Court clarified the legal standard for determining whether the government's failure to disclose impeaching evidence warrants reversal of a conviction. In *Bagley*, the prosecution failed to turn over evidence of the government's agreement to pay the two prosecution witnesses for their cooperation. The district court found that the failure to disclose the agreements was harmless error and refused to vacate the sentence on defendant's subsequent motion brought pursuant to

28 U.S.C. § 2255. The Ninth Circuit reversed. It treated failure to disclose impeachment evidence as "more egregious" than failure to disclose exculpatory evidence, which under its view required automatic reversal. *Bagley v. Lumpkin*, 719 F.2d 1462, 1464 (9th Cir. 1983). In reversing the decision of the Ninth Circuit, the Supreme Court rejected any distinction between impeachment evidence and exculpatory evidence for purposes of the *Brady* rule. 53 U.S.L.W. at 5086.

The majority of the Court then reformulated the standard of materiality applicable to nondisclosed evidence, stating that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 5088 (opinion of Blackmun, J.), *see also id.* (opinion of White, J., concurring in part and concurring in judgment). Justice Blackmun's opinion further defined "a 'reasonable probability' as 'a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Strickland v. Washington*, 104 S. Ct. 2052, 2068 (1984)).

Although the Court in *Agurs* had distinguished the situations in which defendants had made no request for disclosure, had made a general request, or had made a specific request, the Court held in *Bagley* that the announced standard for materiality was "sufficiently flexible" to cover each of these situations. *Bagley*, 53 U.S.L.W. at 5088. The Court remanded the case to the Ninth Circuit to determine "whether there is a reasonable probability that, had the inducement offered by the Government [to the witnesses] been disclosed to the defense, the result of the trial would have been different." *Id.*

Since the standard of "materiality" announced in *Bagley* is significantly different from the one that we

previously applied in this case, we must review the record, the findings of the district court, and the contentions of the parties to determine whether, under the *Bagley* standard, the government's disclosure that use immunity had been granted to Wille would have engendered a reasonable probability that Pflaumer would have been acquitted.

B.

The government's case against Pflaumer was described in the prior opinion of the court, 740 F.2d at 1300-01, 1315-19. Pflaumer was the sole stockholder of Wm. H. P., Inc. (WHP), a Philadelphia, Pennsylvania trucking corporation that purchased diesel fuel in bulk. He also owned C. Schmidt & Sons, Inc. (Schmidt's Brewery), a separate Philadelphia business. The indictment charged that Pflaumer participated in a scheme to falsify invoices to show that the trucks' diesel fuel had been delivered to WHP in Maryland and New Jersey, rather than in Pennsylvania. This falsification permitted the mailing of underreported state fuel excise taxes to Pennsylvania, where the fuel was in fact delivered, and the mailing of false claims for road use credits to Maryland and New Jersey, where in fact the fuel was not delivered and used. Co-defendants with Pflaumer at trial were Harold Oxman, a salesman for Park Oil Co., and Raymond Hill, manager for WHP's Philadelphia terminal. Pflaumer, Oxman and Hill conceded that there was such a scheme, but denied that they participated, instead attributing it to the defendants who had pled guilty, Charles Gillan, President of WHP, and John Luciano, owner of United Fuel Oil and Burner Co., as well as others.

Pflaumer was implicated in the tax fraud scheme by the testimony of a number of witnesses. Frank Jock, a convicted defrauder and the President of Park Oil Co., a fuel oil supplier, testified under an agreement with

the government for preferential treatment with regard to his imprisonment for those convictions. He stated that he proposed the scheme to salesman Oxman as a means to win WHP's business by offering a lower overall price for fuel, and that Oxman arranged a meeting for them with Pflaumer and go-between John McCullough, a union leader who knew Pflaumer. Jock testified that, at the meeting, he explained the "tax-angle routine" to Pflaumer, including the division of its spoils, and that Pflaumer found the arrangement "satisfactory because he was going to save money on the tax." App. at 137. The agreement reached by the four participants, according to Jock, was that seven of the 13 cents a gallon saved through fuel tax fraud would go to Pflaumer, four cents would go to Jock, and two cents would be divided between Oxman and McCullough. *Id.* At Pflaumer's request, Jock repeated the proposed scheme to Gillan, President of WHP, who then directed Jock as to the billing particulars. Park Oil thereafter began receiving fuel orders from WHP. App. at 138-40. Jock then described the operation of the false invoicing scheme for fuel that Park Oil delivered to WHP's Philadelphia terminal but designated on invoices as for WHP in Maryland and New Jersey. App. at 140-45.

At one point, according to Jock, "Billy [Pflaumer] became delinquent in his payments [to Park Oil for the fuel]" and Jock discontinued paying commissions to Oxman and McCullough. App. at 148-51. Jock then told Pflaumer he was forming a new company, M&J Oil, in conjunction with his son, Michael, and Pflaumer did not "express any concern" over the use of the same billing procedures with M&J and said, "[J]ust so everything went along the way it was going it would be fine." App. at 152-53. Jock also testified that Pflaumer, after the date of the last alleged mailing late in 1979, asked Jock and his son, Michael, to destroy invoices to

conceal the tax fraud from state auditors. App. at 159-61. Jock protested that such action should be accompanied by increased business from WHP, and, according to Jock, Pflaumer said he would "see about getting [his son] some business." App. at 160.

Michael Jock's testimony corroborated his father's testimony that Park Oil and M&J Oil falsified invoices under the tax fraud scheme as instructed by Hill. App. at 410, 413-20. Michael Jock also testified that Pflaumer called him to alert him about a state tax audit and to put his accountants in touch with WHP's employee, Abe Siegel. App. at 456-65. He also gave testimony that supported an inference that Pflaumer knew federal excise taxes were not being paid. App. at 421-24, 530.

John Luciano, President of United Fuel Oil and Burner, testified that Oxman and McCullough had met with him, presumably about the time that Frank Jock ceased paying them commissions, to propose that his company become WHP's fuel supplier, using the same tax fraud scheme. Luciano testified that he met with Raymond Hill to discuss arrangements for delivery of fuel oil to WHP, including the false designation of destination in the invoices. App. at 592-95. Oxman brought Luciano to meet Pflaumer, who asked Luciano if he "worked everything out with Ray," and who told him, "[K]eep your nose clean and don't fuck up. We have a good arrangement." App. at 597. United Fuel thereafter began to deliver fuel to WHP, falsely showing that the deliveries were made to Maryland and New Jersey.

Further corroborating testimony came from William Holton, a former accountant for WHP, who testified that he had asked to have Pflaumer's signature on some of the (falsified) tax returns, and that these returns were given to him signed by Pflaumer. App. at 875-79. A Pennsylvania tax auditor testified that he had audited WHP's fuel tax returns

beginning in December 1979, had been shown only a fraction of the true invoices, but had been told by Pflaumer, after confronting him, that he had been given "all that were available, all that there were," App. at 950-51. The government introduced into evidence false returns signed by Pflaumer that were not shown to the auditors but were produced by WHP in response to the federal grand jury subpoena.

This brings us to the testimony of Ralph Wille, the comptroller of WHP, who was the witness as to whom the *Brady* violation is claimed. As our prior opinion makes clear, Wille's most important testimony for the government was that Pflaumer had an active role in WHP's financial affairs, 740 F.2d at 1316, although he also stated that Pflaumer's "primary interest was in the operation of the brewery, Schmidt's Brewery." App. at 860. Wille testified that Pflaumer was aware of all checks paid and "pretty much directed the company . . . . [f]rom the financial end." App. at 859-61. He further testified that both he and WHP's office manager met frequently with Pflaumer to discuss "the financial end" of the business and the checks that were to be written. App. at 861. Although Wille testified as to Pflaumer's active role in WHP, he directly implicated only Gillan in the tax fraud scheme in that Gillan had provided Wille with an explanation for discrepancies in the fuel tax reports. App. at 865-67, 869. This testimony was consistent with both the prosecution and defense theories that Gillan was directly in charge of the day-to-day acts of putting the scheme into operation. The parties differed, of course, as to Pflaumer's role in the scheme. Wille's testimony certainly can be viewed as tending to rebut Pflaumer's defense that he did not participate in the daily role of WHP's financial affairs.

Wille's testimony as to Pflaumer's active role in running WHP was partially corroborated by the

above-described testimony of various witnesses who testified to Pflaumer's actions in choosing WHP's fuel suppliers, in hiring its accounting employees, in signing tax returns, in meeting with a tax auditor, in agreeing to the tax fraud scheme, and in seeking to conceal evidence from state auditors. In addition, Delores Lyons, Office Manager for WHP, corroborated Wille's testimony that she would discuss operations and the "financial end of the business" with Pflaumer, App. at 734, although she also testified that Gillan "was responsible for the running of the organization." App. at 733. Robert Gould, a former WHP accountant, also testified that he had discussed "the financial end" of WHP's business with Pflaumer. App. at 918.

As we noted in our prior opinion, in response to defense requests for material relating to prosecution witnesses, including all agreements, the government disclosed the prior criminal records of Luciano and Frank Jock and the agreements made for their "truthful cooperation". 740 F.2d at 1301. The defense vigorously cross-examined Frank Jock, suggesting that he had implicated Pflaumer only in order to secure a transfer for himself to a minimum-security prison, as well as a reduction in sentence and a favorable parole recommendation. App. at 270-75. Luciano was similarly cross-examined as to, *inter alia*, a series of false statements and reports he made, a series of bad acts, and as to his agreement to plead guilty to only a single count of conspiracy in this case and another single count of evading Federal Excise Tax and the government's agreement not to recommend imprisonment. There was no impeaching cross-examination of Wille.

Pflaumer did not testify. His defense was based on the testimony of three witnesses, Jacqueline Branson, his secretary, William T. Elliott, the president of Schmidt's, and co-defendant Hill. Branson testified

that she observed part of the meeting around November 1976 between Pflaumer, Jock, Oxman and McCullough, at which the government contends Pflaumer's participation in the conspiracy began, because her desk was in that room. She testified that the meeting involved Jock's and Oxman's interest in supplying heating fuel for Schmidt's. App. at 1251-52. On cross-examination, she testified that she was not sitting at the table with the men and that she received frequent phone calls during that meeting. She also conceded on cross-examination that McCullough was the president of the roofer's union, which has nothing to do with Pflaumer's company. On redirect, she stated that McCullough was "a good will ambassador to numerous charities" and was a regular visitor. App. at 1261. She also stated that she did not overhear any conversation relating to fuel taxes at that meeting. *Id.* On re-cross, she conceded that McCullough "wasn't there for charity on that day." App. at 1262.

Elliott, the president of Schmidt's, testified contrary to Wille that Pflaumer spent nearly all his time running the brewery and had delegated the running of WHP to Gillan. App. at 1271.

Co-defendant Hill testified, describing Gillan as the active figure in WHP's affairs, including arranging for fuel oil suppliers. However, on cross-examination, Hill conceded that he had "no knowledge one way or the other about Mr. Pflaumer's involvement in the financial end" of WHP's business or as to "what Mr. Pflaumer told Mr. Gillan to do." App. at 1233.

The government's closing argument to the jury did not mention Wille's testimony, focusing instead on the directly incriminating testimony of Frank Jock, and inferences that it requested the jury to draw from (1) Pflaumer's meeting with Jock, Oxman and McCullough to decide to replace WHP's established fuel suppliers with Jock's company, App. at 1299-1306, and (2)

Pflaumer's failure to produce to state tax auditors invoices which the company had. App. at 1313-18. The government then recounted as corroboration for Jock's story the testimony of Michael Jock, the Pennsylvania tax auditor, John Luciano, and WHP's accountants. App. at 1325-30. The government's theory was not that Pflaumer directed every aspect of the scheme, or that his general involvement with WHP was so close that the jury should infer his participation in the tax fraud, but that Pflaumer had agreed to set the specific tax fraud scheme in motion and had withdrawn from direct involvement in the details, except when the scheme was later threatened by such developments as state tax audits and threats of non-cooperation from his co-conspirators.

Counsel for Pflaumer sought to disassociate him from the acts of Jock, Luciano, and Gillan, emphasizing Jock's and Luciano's motives to lie in order to secure, respectively, release from prison and favorable prosecution treatment. The defense recounted the favorable testimony of several witnesses that showed Pflaumer as cooperating with the grand jury, as interested only in a business deal for cheaper fuel, and as involved for virtually all of his time in the affairs of Schmidt's Brewery. Pflaumer's counsel relied on and emphasized the testimony of Wille to support his theory that Gillan was the culprit. App. at 1363.

The jury convicted Pflaumer on all 21 counts of mail fraud and on the one count of conspiracy. The jury also convicted co-defendant Oxman, but acquitted co-defendant Hill. After counsel learned by happenstance on June 15, 1983, the day after the jury verdict, that the government failed to disclose that it had agreed to give Wille use immunity as set forth above, Pflaumer filed a motion for a new trial contending, *inter alia*, that the suppressed agreement between the government and Wille was material

evidence that should have been disclose . The district court ruled against Pflaumer on all contentions concluding that Wille's testimony was "merely cumulative" of other testimony at trial. App. at 1672. The district court stated the standard as whether the "suppressed evidence might have affected the outcome of a trial," App. at 1671, or whether it "is reasonably likely to have changed the jury's judgment." App. at 1672. Under this standard, the court concluded that the non-disclosure would not have affected the outcome of the trial. App. at 1672. The court reasoned:

> Frank Jock testified that he entered into a conspiracy with Mr. Pflaumer. John Luciano also testified as to Mr. Pflaumer's involvement. Indeed, defendants' memorandum in support of motion for judgment of acquittal acknowledges the inculpatory nature of their combined testimony. Defendants' memorandum states "Mr. Luciano does not directly inculpate Mr. Pflaumer to the same degree that Mr. Jock does." . . . Clearly, therefore, even if the defendants had been able to impeach Wille by virtue of the immunity agreement, there was sufficient other evidence implicating Mr. Pflaumer.

App. at 1672-73.

The standard applied by the district court was close to that adopted by the Supreme Court in *Bagley*. The district court correctly focused on the reasonable probability that, had the Wille agreement been disclosed, the result would have been different. Because Pflaumer cannot attack the legal reasoning of the district court, that court's weighing of the evidence merits deference from the Court of Appeals, *see United States v. Agurs*, 427 U.S. at 114, especially given the difficulty inherent in measuring the effect of a non-disclosure on the course of a lengthy trial covering

many witnesses and exhibits. *See, e.g., United States v. Provenzano*, 615 F.2d 37, 49 (2d Cir.), *cert. denied*, 446 U.S. 953 (1980); *United States v. Librach*, 609 F.2d 919, 922 (8th Cir. 1979), *cert. denied*, 444 U.S. 1080 (1980); *Skinner v. Cardwell*, 564 F.2d 1381, 1388 (9th Cir. 1977), *cert. denied*, 435 U.S. 1009 (1978).

Even on a completely independent review of the record, however, we would reach the same conclusion. The jury was presented with substantial evidence of Pflaumer's guilt, both direct and circumstantial, from multiple and corroborating sources. Wille's testimony was largely supported by that of other witnesses, although he was the only witness stating that Pflaumer directed most of WHP's financial activities and controlled its payment of checks. Moreover, this testimony, even though it supported an inference that Pflaumer must have participated in the tax fraud scheme, was by no means as important to the prosecution as was the more direct incriminating testimony of other witnesses. Wille was not the sole witness supporting the prosecution case, *compare United States v. McCrane*, 547 F.2d 204, 206 (3d Cir. 1976) (per curiam), nor one of only two incriminating prosecution witnesses on whom the government's entire case was based, as in *Bagley*.

Moreover, Wille was not offered a direct benefit in return for his testimony, as were Jock and Luciano, but testified only under a grant of use immunity that was "not specific on the subject matter of the government's investigation." 740 F.2d at 1311. Although the agreement was admissible to impeach Wille, *id.*, and may have suggested some inducement to cooperate with the prosecution in return for favorable consideration, it was surely of less direct import than prosecutorial promises of leniency and of favorable sentencing and parole recommendations.

In sum, in light of the totality of other evidence presented, the prosecution's failure to rely on Wille's testimony in closing, and Pflaumer's counsel's use of Wille's testimony in his closing as supportive of Pflaumer's defense, we conclude, as did the trial court, that there is not a reasonable probability that the result of the trial would have been different had the defense been in a position to use Wille's use immunity agreement to cross-examine him. The government's failure to disclose the immunity agreement, in the context of the facts and full record of this case, does not undermine our confidence in the verdict.

Nonetheless, we reiterate that a prosecutor's failure to disclose immunity agreements may lead to subversion of defendants' due process rights, and is incompatible with the government's obligation "to see that, so far as possible, truth emerges." *Bagley*, 53 U.S.L.W. at 5090 (Marshall, J., dissenting) (quoting *Giles v. Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J., concurring in judgment)). However, as noted above, we conclude that we cannot hold that the district court erred in denying Pflaumer's motion for a new trial on the basis of nondisclosure of evidence.

II.

The Jury Instruction

The parties are in sharp disagreement whether our prior judgment vacating Pflaumer's convictions on all counts may be reinstated because of our prior holding on the jury instruction issue. The government contends that our holding that the jury instructions were inadequate was limited to the conviction on the conspiracy count. Pflaumer contends that we held that the conviction on the 21 substantive mail fraud counts must also be overturned.[1] A reading of the opinion, as

1. The parties disputed this issue in their papers before the Supreme Court as well. The government's petition for certiorari

well as consideration of the indictment, the relevant evidence, the proffered instruction and the charge given by the court, make clear that both the discussion and holding in our prior opinion were directed to the conspiracy count.

The substantive mail fraud counts of the indictment charged that three of the five defendants, Pflaumer, Gillan and Oxman (with Luciano who was named as a defendant only in the conspiracy count), caused certain mailings for the purpose of executing the scheme and artifice to defraud. The indictment listed 21 mailings from April 3, 1978 to June 30, 1979, corresponding to each of the 21 substantive mail fraud counts. Count 22 charged a conspiracy against all five defendants, Pflaumer, Gillan, Oxman, Hill and Luciano, alleging that they, together with unindicted co-conspirator Frank Jock, conspired with each other to devise the scheme and artifice to defraud and to execute the scheme through the mailings which falsely stated the place of delivery of the diesel fuel to avoid payment of the appropriate taxes.

The nine overt acts alleged to have been in furtherance of the conspiracy were two separate orders of diesel fuel and seven meetings beginning with one in November 1976 among Pflaumer, Oxman, Jock and McCullough, and ending with four meetings in March 1978, one of which was among Pflaumer, Oxman, Luciano and McCullough. However, the indictment charged that the conspiracy continued from November 1976 to January 31, 1981, almost three years beyond the

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stated that the error affected only the conspiracy instruction and was not an independent basis for reversal of the convictions on the 21 substantive counts. Pflaumer countered that the Court should not grant certiorari because the *Brady* issue as to which review was sought was only one of two separate and independent bases for reversal. The Court nonetheless granted certiorari, vacated our judgment and remanded.

overt acts alleged, and one and one-half years beyond the last mailing constituting a substantive mail fraud charge, because the government takes the position that the conspiracy extended through the efforts to conceal it.

There was ample evidence before the jury that Pflaumer actively tried to cover up the fuel tax scheme. Bernard Eisenhour, the Pennsylvania auditor, testified that he began his audit of WHP in December 1979 but that he was shown only a fraction of the company's fuel purchase invoices which the company later produced pursuant to a federal grand jury subpoena. App. at 945, 948. Eisenhour testified that after speaking originally with the company's controller and an outside accountant, he spoke directly with Pflaumer in February 1980 and that Pflaumer told him [falsely] that the company had no other fuel invoices. App. at 949-51. Frank Jock also testified that Pflaumer requested that his son destroy the fuel invoices. App. at 330. These acts of concealment were not alleged as overt acts in the indictment.

Pflaumer proffered an instruction which, *inter alia*, stated that:

> You may not find any defendant guilty merely on the basis of anything he did or said after June, 1979. This is because a conspirator cannot join a conspiracy or scheme after its attempts to achieve illicit objectives has ended. . . . In short, if you find that the Government has not proved beyond a reasonable doubt that Mr. Pflaumer knowingly and willfully became a member of the alleged conspiracy or scheme to defraud Pennsylvania, New Jersey and Maryland of diesel fuel taxes prior to June, 1979, you must acquit Mr. Pflaumer of all charges.

App. at 1498. The full charge proffered is in the margin,[2] and, although we did not mention this fact in our prior opinion, the proffered instruction was captioned: "Timing of *Conspiracy*". *Id.* (emphasis added). The district court refused to charge as requested regarding "the time of the conspiracy." App. at 1293. In objecting to the court's denial of this point for charge, Pflaumer's counsel stated that the court had to make clear to the jury that "[w]hat happened during the audit is no basis for making [Pflaumer] a member of either the conspiracy or the scheme." App. at 1294. [Tr. 1245].

On appeal, the government contended that the district court was justified in refusing the requested instruction because the post-June 30, 1979 efforts of concealment constituted a ratification of the prior

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2. The instruction proffered by the defendants was as follows:

> The indictment charges that the last tax return mailed as part of the alleged scheme and conspiracy was dated June 30, 1979. It was at that time, therefore, that the illicit objectives of the alleged conspiracy or scheme terminated. You may not find any defendant guilty merely on the basis of anything he did or said after June, 1979. This is because a conspirator cannot join a conspiracy or scheme after its attempts to achieve illicit objectives has ended. Therefore, you may not find Mr. Pflaumer guilty merely on the basis of anything he did after February, 1979. [sic] You have heard testimony of state auditors about their dealings with Mr. Pflaumer's companies after June, 1979. If you find that Mr. Pflaumer only became aware of the alleged conspiracy or scheme to defraud Pennsylvania, New Jersey and Maryland of diesel fuel taxes at the time of these audits, you must acquit Mr. Pflaumer of all charges. In short, if you find that the Government has not proved beyond a reasonable doubt that Mr. Pflaumer knowingly and willfully became a member of the alleged conspiracy or scheme to defraud Pennsylvania, New Jersey and Maryland of diesel fuel taxes prior to June, 1979, you must acquit Mr. Pflaumer of all charges.

App. at 1498.

action of the co-conspirators. The majority opinion states:

> That contention must be rejected because it conflicts with *Grunewald v. United States, supra*, which holds that acts of concealment after the principal object of the conspiracy (*here use of the mails to defraud three states of tax revenues*) has been completed do not comprise part of the conspiracy. *See* 353 U.S. at 403-06, 77 S. Ct. at 973-75.

740 F.2d at 1305 (emphasis added).[3]

We also rejected the government's alternative argument that the charge as given was substantially in accordance with the request, because "the court charged that the jury may find that the defendants joined 'each conspiracy' as late as January, 1981." *Id.* We held that the trial court erred because the conspiracy charged under 18 U.S.C. § 371 was not a conspiracy to defraud the states but a conspiracy to violate the mail fraud statute, which ended with the last mailing in June of 1979. We stated,

> because the charge permitted the jury to find that the defendants joined the conspiracy after its principal object had terminated in June of 1979, the charge as given is inconsistent both with the indictment and with *Grunewald v. United States, supra*.

Id. Although the charge proffered by Pflaumer which was focused primarily on conspiracy also referred to the other charges, our holding with regard to the charge was stated in terms of the erroneous charge

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3. In my dissent, I did not join the majority's conclusion that the charge was erroneous, 740 F.2d at 1322-23 n.2, but I am bound by the majority's holding. Significantly, the oral argument on the prior appeal was limited, at the panel's direction, to the *Brady* issue.

regarding the time that Pflaumer "joined the *conspiracy*." 740 F.2d at 1319 (emphasis added). It is evident, therefore, that our holding that Pflaumer was entitled [illegible] new trial on that basis applies only to count

We must now consider Pflaumer's contention that the charge given was erroneous insofar as it applies to the substantive mail fraud counts. Pflaumer contends that the erroneous conspiracy instruction infected the entire charge because it invited the jury to convict Pflaumer vicariously for the 21 mail fraud counts even if the jury concluded that Pflaumer had not joined the conspiracy before his post-mailing acts. In reviewing jury instructions, we must review the instructions as a whole to preserve their context. *United States v. Palmeri*, 630 F.2d 192, 201 (3d Cir. 1980), *cert. denied*, 450 U.S. 967 (1981). After reviewing the charge, we see no basis to conclude that the charge either invited or permitted the jury to convict Pflaumer on the substantive counts on the basis of the post-conspiracy acts of concealment.

The trial court gave a lengthy charge in which it reviewed the indictment in detail, separating the 21 charges of mail fraud from the conspiracy charge. The incorrect instruction was part of the court's instructions on conspiracy, not mail fraud. The district court did not link this instruction to the elements of the mail fraud charges and did not imply that post-mailing activity could have in itself provided sufficient evidence of Pflaumer's participation in a scheme to commit mail fraud. On the mail fraud charges, the district court read extensively from the indictment on Counts 1 through 21, which repeatedly emphasized dates only up to the last mailing, June 30, 1979. App. at 1435, 1440-42. The court gave the jury a copy of the indictment containing the list of alleged mailings and dates. The jury was instructed to

consider each mailing separately, as each was charged as a separate count. App. at 1453.

The jury was instructed that in order to find the defendant guilty of mail fraud it would have to find (1) the existence of a scheme to defraud, (2) the use of the mails in furtherance of the fraudulent scheme, and (3) participation by the defendant with specific intent to defraud. App. at 1450. *See* 18 U.S.C. § 1341. Consistent with the law, the court further instructed that the second element is established if the use of the mails was reasonably foreseeable by the defendant. App. at 1452. The court stated, "Where one does an act with knowledge that the use of the mails *will follow* in the ordinary course of business, or where *such use can reasonably be foreseen*, even though not actually intended, then he causes the mails to be used." App. at 1452 (emphasis added). Nothing in these instructions invited the jury to conclude that conduct subsequent to the last mailing amounts to participation in the scheme to defraud. Indeed, the very requirement of foreseeability implies that the jury must have found Pflaumer's participation in the scheme *prior* to the 21 alleged mailings. Pflaumer does not suggest that there was insufficient evidence to support such a conclusion.

Pflaumer contends that it was error for the court to have refused his requested instruction, which would have made clear that the jury must acquit Pflaumer of all charges if it found him to be aware of both the conspiracy and scheme to defraud only after June 1979. We pointed out in the prior opinion, however, that the failure to give the requested charge was not error *per se*. 740 F.2d at 1305. The important question is whether the charge given was "consistent with the indictment" and the law. *Id.* The mail fraud charge was consistent with the indictment and turned exclusively on the dates of mailings contained therein.

The court's instructions regarding the criminal responsibility for the past acts of co-conspirators in furtherance of the joint goal, App. at 1464, 1644, 1468-69, were all made in the charge on conspiracy, not mail fraud, and the distinction was clearly made by the trial judge when he said, "Let me talk to you now about conspiracy." App. at 1401. The mail fraud instructions made no mention of the possibility of vicarious liability for acts done prior to Pflaumer's joining the scheme to defraud and, instead, stressed that the use of the mails must have been foreseeable. Taking the charge as a whole, there is no basis for us to speculate that the jury ignored the specific instructions on the timing of the mailings and convicted Pflaumer of mail fraud by concluding he was vicariously liable for the mail fraud of his co-conspirators if it believed Pflaumer's only action was in concealing the fraud after the last mailing on June 30, 1979. Therefore, we will affirm the convictions on Counts 1 through 21.

III.

For the reasons set forth above, we will affirm the judgment of conviction on the 21 mail fraud counts, and we will reverse the judgment of conviction on Count 22, the conspiracy count, and will remand to the district court for a new trial on that count.

GIBBONS, *Circuit Judge*, dissenting:

I.

The appeal of William H. Pflaumer is before us under puzzling circumstances. Pflaumer was convicted on twenty-one counts of mail fraud and one count of conspiracy to commit mail fraud. When the case was first before us on direct appeal, we held that Pflaumer was entitled to a new trial for two independent reasons: the government's improper withholding of specifically requested exculpatory materials and the district court's erroneous jury instruction with respect to proof of membership in a conspiracy. *See United States v. Oxman*, 740 F.2d 1298, 1319 (3d Cir. 1984), *vacated and remanded sub nom. United States v. Pflaumer*, 105 S. Ct. 3550 (1985). Following that decision the United States petitioned for certiorari but did so only with respect to the first reason, *see* Petitioner's Petition for a Writ of Certiorari at i, *United States v. Pflaumer*, as Pflaumer pointed out in his brief opposing the government's petition, *see* Respondent's Brief in Opposition at 2, *United States v. Pflaumer*. The government's reply memorandum, filed on June 14, 1985, urged that the second ground for granting a new trial related only to the conspiracy charge on which Pflaumer was convicted, and not to the twenty-one substantive mail fraud counts. *See* Petitioner's Reply Memorandum at 1-2, *United States v. Pflaumer*. Without briefing or argument, the Court, on July 2, 1985, entered an order that provides in full:

> On WRIT OF CERTIORARI to the United States Court of Appeals for the Third Circuit
>
> THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,
>
> ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of

> the above court in this cause is vacated, and that this cause is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *United States v. Bagley*, 473 U.S. ___ (1985).

Certified Copy of Mandate, *United States v. Pflaumer* (received August 5, 1985).

Although the Court refers to the petition for writ of certiorari and "response thereto," it does not mention the government's reply memorandum. Thus it is not clear that the Justices even considered the reply memorandum or consciously addressed Pflaumer's argument that independent grounds supported this court's reversal of Pflaumer's conviction. The Court simply remanded "for further consideration in light of *United States v. Bagley*." The *Bagley* case deals only with the government's duties to produce exculpatory materials. Therefore the Court did not explicitly instruct us to reconsider our ruling that the erroneous jury instruction justified a new trial. Nevertheless, the Court vacated our judgment, not our opinion, as unquestionably it was authorized to do. *See* 28 U.S.C. § 2106 (1982). The necessary effect of vacating the judgment is to deprive it of finality and leave open for reconsideration all issues previously decided, regardless of the Justices' conscious intent.

Equally puzzling is the Justices' failure to note a significant difference between the record that was before the Court in *Bagley* and the one before it in Pflaumer's case. Both cases involve post-conviction motions for a new trial based upon discoveries, made after trials, that the government had failed to disclose evidence that the defendants had specifically requested from the government before the trials and that they might have used to impeach government witnesses who testified at the trials. *Bagley*, however, was a

bench trial, and the defendant there requested a new trial from the very judge who made the findings of fact that resulted in the challenged conviction. That judge obviously was familiar with his own deliberations. Pflaumer's case, on the other hand, was a jury trial, and Federal Rule of Evidence 606(b) prohibited the judge to whom the new-trial motion was addressed from inquiring into the jury's deliberative processes. This distinction is important because in *Bagley* the Court struggled — somewhat inconclusively as I note below — to establish an appropriate test for ascertaining whether withheld requested impeachment evidence is material to the challenged conviction.

None of the opinions that address the materiality issue in *Bagley* explain why the test for materiality should be identical in bench and jury trials. Possibly what the Supreme Court had in mind when it summarily vacated the judgment of this court "for further consideration in light of *United States v. Bagley*" was that we consider whether, in light of the strictures of Rule 606(b), the test for materiality in the nonjury context would be workable in the jury trial context. Possibly the Court, on the other hand, tacitly assumed that the two contexts were indistinguishable for purposes of materiality analysis.

Finally, the *Bagley* opinion itself is puzzling because of the form of the Court's judgment. Although the district court had found beyond a reasonable doubt that, had the government not withheld the requested information, the trial's outcome would have been the same, the Court "remand[ed] the case to [the court of appeals] for a determination whether there is a reasonble probability that, had the inducement offered by the Government to [witnesses] been disclosed to the defense, the result of the trial would have been

different." *Bagley*, 105 S. Ct. at 3385.[1] Unfortunately, the Court does not discuss the scope of review a court of appeals is to employ in making such a determination; a determination that, depending upon whether the lower court trial is a jury trial or bench trial, obviously will require the consideration of different issues.

But while I am thus triply puzzled by the less than pellucid direction we have received from the Supreme Court, one thing seems clear to me: we must reconsider both grounds on which we awarded a new trial, at least to the extent of determining whether, independent of the issue of the undisclosed exculpatory material, the error in the jury instruction warrants a new trial on all counts. If we conclude that the error in the instruction does mandate a new trial on all counts, we simply would enter the same judgment as before. Therefore, it seems logical to me to consider that issue first.

II.

For convenience the discussion of the erroneous jury instruction in the prior opinion of this court is quoted in the margin.[2] We concluded that

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1. Compare *United States v. Agurs*, 427 U.S. 97, 114 (1976), a case in which the Supreme Court, while reviewing a jury conviction, relied on a district court's appraisal of the record in ruling that nondisclosure of impeachment evidence not specifically requested did not warrant a new trial.

2. Pflaumer contends that the trial court erred in refusing to give a proffered instruction as follows:

> The indictment charges that the last tax return mailed as part of the alleged scheme and conspiracy was dated June 30, 1979. It was at that time, therefore, that the alleged conspiracy or scheme terminated. You may not find any defendant guilty merely on the basis of anything he did or said after June, 1979. This is because a conspirator cannot

[b]ecause the trial court erred in rejecting Pflaumer's request for a charge that the jury must find that he joined the conspiracy prior to the last mailing, and because the government withheld specifically requested *Brady* material, his conviction must be reversed, and the case remanded for a new trial.

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join a conspiracy or scheme after its attempts to achieve illicit objectives [have] ended . . . . In short, if you find that the government has not proved beyond a reasonable doubt that Mr. Pflaumer knowingly and willfully became a member of the alleged conspiracy or scheme to defraud Pennsylvania, New Jersey and Maryland of diesel fuel taxes prior to June, 1979, you must acquit Mr. Pflaumer of all charges.

App. at 1498. To understand this request one must appreciate what was charged in the indictment.

The first twenty-one counts alleged twenty-one separate mailings, each a separate substantive violation of 18 U.S.C. § 1341 (1982). The first mailing took place on April 3, 1978, the last on June 30, 1979. These mailings were alleged to violate section 1341 because they were for the purpose of executing a scheme or artifice, which arguably extended over a longer period, to defraud the three states. The scheme itself does not, however, violate federal law; only the use of the mailings to effectuate the scheme does so. *See Kann v. United States*, 323 U.S. 88, 94-95, 65 S.Ct. 148, 150-151, 89 L.Ed. 88 (1944); *United States v. Tarnopol*, 561 F.2d 466, 471 (3d Cir. 1977).

The twenty-second count charges a conspiracy in violation of 18 U.S.C. § 371 (1982), which proscribes conspiracies "to commit any offense against the United States." The conspiracy charged in the indictment alleges:

> a scheme and artifice to defraud the Commonwealth of Pennsylvania, the State of New Jersey, and the State of Maryland by means of false and fraudulent pretenses and representations, and for the purpose of executing such scheme and artifice to defraud and attempting so to do, to place in and cause to be placed in an authorized depository for mail matter, certain matter as described in Counts One through Twenty One, in violation of Title 18 United States Code, Section 1341 . . . .

Oxman, 740 F.2d at 1319. Plainly our conjunctive reference to the two trial errors, coupled with our reversal of Pflaumer's conviction on all counts, indicates our belief that both errors afforded independent grounds for reversal on all counts. As indicated in Part I above, however, the necessary consequence of the Supreme Court's judgment is that we must now reconsider our ruling with respect to the jury charge.

App. at 17. As with the substantive section 1341 counts, the fraudulent scheme itself does not violate the federal conspiracy statute. The federal conspiracy must be to violate a federal substantive law -- in this instance, the substantive prohibition against the use of the 21 mailings alleged in the first 21 counts.

Pflaumer's point in making the quoted request for charge was straightforward. A conspiracy to violate a substantive prohibition in a federal statute ends when the unlawful object has been accomplished. *Grunewald v. United States*, 353 U.S. 391, 406-15, 77 S.Ct. 963, 974-79, 1 L.Ed.2d 931 (1957). The object of the conspiracy charged in the indictment was the use of the mails to effectuate a scheme to defraud three states of tax revenues. Although the scheme may have continued until 1981 — an issue on which we express no opinion — the use of the mails to effectuate the scheme ceased in 1979. Thus, the conspiracy charged in the indictment ended in June of 1979, and in order to convict the jury must have found that Pflaumer joined the conspiracy before that date.

From the viewpoint of Pflaumer's defense, this issue was quite significant. There is evidence from which the jury could have found that when state agencies conducted audits of WHP after June of 1979, Pflaumer's actions tended to conceal the scheme. This evidence was admitted at trial *not* to show Pflaumer's membership in the conspiracy — that was prohibited by *Grunewald* — but to raise an inference of consciousness of guilt. *See United States v. Mastropieri*, 686 F.2d 776, 790-91 (2d Cir.), *cert. denied*, 459 U.S. 945, 103 S.Ct. 260, 74 L.Ed.2d 203 (1982); App. at 1665-66. The jury, however — not finely versed in these subtle distinctions — might have mistakenly applied evidence of concealment to show membership in the conspiracy. Hence Pflaumer requested an instruction expressly charging that the jury must, in order to convict, establish membership in the conspiracy based on evidence of acts before June of 1979.

Insofar as the conspiracy count is concerned, its reconsideration need not detain us long. For the reasons set forth in our prior opinion, the charge violated the rule, set out in *Grunewald v. United States*, 353 U.S. 391, 406-15 (1957), that, because a conspiracy to violate a federal statute ends when the unlawful object has been accomplished, evidence of post-event concealment of the conspiracy is inadmissible to show membership in the conspiracy. As we noted, the charge as given permitted the jury to rely on such evidence to show membership in the conspiracy, whereas it was only admissible to raise an inference of consciousness of guilt. *See Oxman*, 740 F.2d at 1304.

The court refused the requested instruction. The government defends that refusal on several grounds. One is that post-June 30, 1979 efforts at concealment "constitute a ratification of the co-conspirator's antecedent conduct including any mailings made in furtherance of the scheme." Appellee's Br. at 50. That contention must be rejected because it conflicts with *Grunewald v. United States*, *supra*, which holds that acts of concealment after the principal object of the conspiracy (here use of the mails to defraud three states of tax revenues) has been completed do not comprise part of the conspiracy. *See* 353 U.S. at 403-06, 77 S.Ct. at 973-75.

Alternatively, the government contends that the charge given was substantially in accordance with the request. The court charged in part:

> In order to find any defendant guilty on Count 22 [conspiracy] you must find all the following elements beyond a reasonable doubt:
>
> (1) That the conspiracy described in the Indictment was existing at or about the time alleged;
>
> (2) That the particular defendant willfully became a member of the conspiracy with knowledge of its illegal objectives;
>
> (3) That one of the conspirators thereafter knowingly committed at least one of the overt acts alleged in the

A separate question, not explicitly discussed in our prior opinion, is whether we can say with confidence that the erroneous instruction had no effect upon the substantive mail fraud counts on which Pflaumer was also convicted. In light of the district court's instructions, I am unable to conclude that the error had no effect upon the jury's deliberations on these counts.

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indictment, at or about the time charged and during the period of the conspiracy; and

(4) That the overt act was knowingly done in furtherance of some object or purpose of the conspiracy as charged.

If you should find beyond a reasonable doubt from the evidence that the existence of the conspiracy charged in the Indictment has been proved and that during the existence of that conspiracy one of the overt acts alleged was knowingly done by one of the persons found by you to have been a conspirator, in furtherance of some object or purpose of the conspiracy, that proof of the conspiracy is complete; and it is complete as to every person found by you to have been willfully a member of that conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

App. at 1458-59. Had the court stopped at this point, we could have accepted the government's alternative argument. This much of the charge, while less specific in advancing Pflaumer's theory than the requested instruction, is not inconsistent with the indictment and complies with *Grunewald*. But the court continued:

[1] The Indictment alleges numerous overt acts in furtherance of *each* conspiracy. What must be shown is that after the defendant, whom you are considering, joined the conspiracy, some one of the conspirators performed an overt act in furtherance of the conspiracy.

[2] Keep in mind that the Government must establish beyond a reasonable doubt that at least one of the overt acts as alleged in the indictment occurred while the conspiracy was still in existence. *That is, the overt act must have occurred between approximately November, 1976, and*

The twenty-one substantive counts allege violations of 18 U.S.C. § 1341 (1982), which prohibits use of the mails to further a scheme to defraud. The government charged that Pflaumer was part of a scheme to defraud Pennsylvania, Maryland, and New Jersey of full excise and road use taxes properly due from a corporation, Wm. H. P., Inc. (WHP), that Pflaumer owned. The theory of Pflaumer's defense was that he knew nothing about the mail fraud scheme, but that Charles Gillan, President of WHP, was solely responsible for it.

The district court instructed the jury that it had to find the existence of a scheme to defraud, use of the

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January, 1981. You're not to consider any acts that occurred after the conspiracy was terminated.

App. at 1467-68 (emphasis added). Thus, the court charged that the jury may find that the defendants joined "each conspiracy" as late as January, 1981. Plainly the court here rejected Pflaumer's theory that a section 371 conspiracy to violate the mail fraud statute ends with the last mailing, here in June of 1979. The reference to plural conspiracies, and to overt acts after June 30, 1979, suggests that the court focused on a conspiracy to defraud the states as itself a violation of section 371. Such a conspiracy would not be a violation of section 371, nor does the indictment so charge. In any event, because the charge permitted the jury to find that the defendants joined the conspiracy after its principal object had terminated in June of 1979, the charge as given is inconsistent both with the indictment and with *Grunewald v. United States*, *supra*.

Finally, the government notes that, as the penultimate paragraph of the charge above (denoted [1]) indicates, the court charged that "[w]hat must be shown is that *after the defendant . . . joined the conspiracy, some one of the conspirators performed an overt act* in furtherance of the conspiracy." App. at 1467. The last overt act charged in the indictment occurred in March of 1978. The jury had a copy of the indictment. Therefore, the government maintains, although the charge permitted the jury to find an overt act as late as January, 1981, the jury must have found an overt act no later than March of 1978. Thus, the government concludes, the jury must have found that Pflaumer joined the conspiracy before that date. Appellee's Br. at 47.

mails in furtherance of that scheme, and participation by the defendant in the scheme with the requisite specific intent. *See* Joint Appendix at 1450. The court also explained that "where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he causes the mails to be used." *Id.* at 1452. And the court stated that "[i]n a crime where two or more persons are charged with the commission of a crime, the guilt of any defendant may be established without proof that he personally did every act constituting the offense charged or that he personally participated at all in the offense charged." *Id.* at 1456. The instruction continued,

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We cannot agree. We see no basis for believing that the jury would ignore the court's instruction that it may find that the last overt act occurred in 1981. And we view with skepticism the suggestion that the jury would have understood which of the court's instructions to obey and which to ignore. Moreover, the jury heard a significant amount of evidence suggesting possible concealment by Pflaumer after 1979, inviting it to do exactly what Pflaumer feared — find that he joined the conspiracy after the last mailing. Thus, far from suggesting that the jury may have ignored the court's instructions, the evidence suggests that it may well have done precisely what the jury is expected to do: abide by them.

We must also determine whether the error is harmless. Fed. R. Crim P. 52(a). If the evidence connecting Pflaumer to the conspiracy prior to June 30, 1979 were overwhelming, we could accept such an analysis. But as we observe in Part IV *infra*, that is not the case. Although some evidence tended to connect Pflaumer to the conspiracy before 1979, it is not sufficient to negate the possibility that the jury established his membership based in significant part on the post-1979 evidence. Because there is a reasonable likelihood that the jury may have considered acts of concealment as evidence of membership in the conspiracy alleged, we cannot find the error harmless.

Oxman, 740 F.2d at 1303-06.

> In order to aid and abet another to commit a crime it is necessary that the particular person willfully associate himself in some way with the criminal venture and willfully participates [sic] in it as he should in something he wishes to bring about; that is to say, that he willfully seeks by some act of his to make the criminal venture succeed.

Id. at 1457.

The indictment, the government's evidence, and the quoted instructions about the substantive mail fraud counts make it quite clear that what was charged was a scheme to defraud in which numerous persons participated. In the context of such a charge, we must consider whether the *Grunewald* error might have affected the jury's deliberations over Pflaumer's participation in that multi-party scheme, and we cannot divorce that consideration from the court's conspiracy instruction, for common to both was the government's burden of establishing Pflaumer's participation in an ongoing enterprise involving other participants.

In its instruction on the conspiracy count, the district court told the jury,

> One who willfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy. The guilt of a conspirator is not governed by the extent or duration of his participation in the conspiracy or whether he had knowledge of all of its operations. Thus, one conspirator may play a major role, while others play a minor role or a minor part.
>
> Even if one joined the conspiracy after it was formed and was engaged in it to a degree more limited than that of other co-conspirators, he is

> equally culpable so long as he was a co-conspirator.
>
> In other words, it is not required that a person be a member of the conspiracy from its very start. *He may join at any point during its progress, and he may be held responsible for all that has been done before he joins and all that may be done thereafter during its existence and while he remains a member. Simply stated, using the partnership analogy by becoming a partner he assumes all the liabilities of the partnership including those occurred* [sic] *before he became a member.*

Joint Appendix at 1464 (emphasis supplied). Moreover, the court made references to overt acts alleged in the indictment, charging,

> The Indictment alleges numerous overt acts in furtherance of each conspiracy. What must be shown is that after the defendant, whom you are considering, joined the conspiracy, some one of the conspirators performed an overt act in furtherance of the conspiracy.

Id. at 1467.

Because both the scheme to defraud and the conspiracy involved concert of action and because the conspiracy involved the same overt acts as did the scheme, I cannot rule out the likelihood that some jurors did not assume that the instruction that Pflaumer "may be held responsible for all that has been done before he joins and all that may be done thereafter during its existence" was as applicable to the overt acts in furtherance of the scheme as to the overt acts in furtherance of the conspiracy.

Of course, co-conspirator statements made during and in furtherance of a conspiracy are admissible as proof of substantive offenses. *In re Japanese*

Electronics, 723 F.2d 238, 263 (3d Cir. 1983), *cert. granted sub nom. Matsushita Electric Industrial Co.*, 105 S. Ct. 1863 (1985); *United States v. Cahalane*, 560 F.2d 601, 605 n.4 (3d Cir.), *cert denied*, 434 U.S. 1045 (1977). But the problem here is that, under *Grunewald*, proof of the post-conspiracy activities was inadmissible as proof of those offenses; at best, such evidence was admissible to prove Pflaumer's consciousness of guilt. Yet, the district court gave no such limiting instruction, and thus we held that the jurors might have relied on that evidence to show membership in the common enterprise. *See Oxman*, 740 F.2d at 1304. Given the likelihood that that evidence, combined with the instruction that a conspirator becomes liable for all offenses committed by co-conspirators before that conspirator joined the conspiracy, tainted the jury's finding that Pflaumer participated in the scheme, I cannot fairly exclude the possibility that the jury's finding of liability for the scheme and the mailings in furtherance of its objects was affected by the *Grunewald* error.

Indeed, the charge that Pflaumer requested anticipated this problem, for it was addressed both to the conspiracy and the scheme to defraud.[3] Moreover,

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3. In relevant part the requested instruction read:

> You have heard testimony of state auditors about their dealings with Mr. Pflaumer's companies after June, 1979. If you find that Mr. Pflaumer only became aware of the alleged *conspiracy or scheme* to defraud Pennsylvania, New Jersey and Maryland of diesel fuel taxes at the time of these audits, you must acquit Mr. Pflaumer of all charges. In short, if you find that the Government has not proved beyond a reasonable doubt that Mr. Pflaumer knowingly and willfully became a member of the alleged *conspiracy or scheme* to defraud Pennsylvania, New Jersey and Maryland of diesel fuel taxes prior to June, 1979, you must acquit Mr. Pflaumer of all charges.

Joint Appendix at 1498 (emphasis supplied).

the trial court, in denying Pflaumer's post-trial motion for a new trial, understood full well that the requested instruction was aimed at limiting the use to which evidence of conduct that occurred after the events charged in the indictment could be put with respect to membership in the conspiracy and participation in the multi-party scheme. *See id.* at 1665.

Considering the text of the requested instruction, the trial court's treatment of it in the post-trial motion, and the absence of any analytical distinction between proof of membership in a conspiracy to violate the mail fraud statute and proof of membership in a group engaged jointly in a scheme to defraud, it is understandable that our prior opinion was not as explicit as it might have been in dealing with the effect of the *Grunewald* error on the mail fraud counts. And although Judge Sloviter's majority opinion states that "our holding that Pflaumer was entitled to a new trial on that basis applies only to count 22," typescript 23, that was not the intention of the draftsman of the majority opinion. In any event, as the Supreme Court apparently intended, I have reconsidered and would still hold, this time explicitly, that the court should have given the requested instruction both with respect to Pflaumer's membership in the conspiracy and with respect to his participation in the group carrying out the scheme to defraud.

III.

Because the judges in the majority hold that the *Grunewald* error could not have affected the jury's deliberations on the mail fraud counts, they also address the significance of *United States v. Bagley*, 105 S. Ct. 3375 (1985). As I have noted in Part I above, the remand in this case for reconsideration in light of *Bagley* leaves for our solution several puzzles. Because I disagree with the solutions announced in Judge Sloviter's opinion, I address this second issue, even

though in my view the *Grunewald* error alone requires a new trial.

A.

Judge Sloviter observes that in *Bagley* the Supreme Court "clarified the legal standard for determining whether the government's failure to disclose impeaching evidence warrants reversal of a conviction." Typescript 4. The characterization of *Bagley* as a clarification of those standards is generous to a fault. In our prior opinion I set forth the tangled evolution of the rules on the prosecutor's duty to disclose, from *Pyle v. Kansas*, 317 U.S. 213 (1942), through *United States v. Agurs*, 427 U.S. 97 (1976), and discussed why that set of rules seemed designed to tempt prosecutors to withhold information and to encourage post-conviction litigation. *See Oxman*, 740 F.2d at 1306-11. *Bagley* certainly has changed those rules, but no one can say with a straight face that they have been "clarified."

The *Agurs* rules, whatever their merit, were set forth in an opinion of the Court, while in *Bagley* the most significant issue — materiality of the undisclosed evidence — must be discerned from several opinions, none of which commanded a majority.

Unlike *Agurs*, *Bagley* and this case both deal with the prosecutor's duty to disclose evidence that might be used only for impeachment purposes. In *Agurs* the defendant had not specifically requested the arguably exculpatory material—a criminal record indicating the witness's propensity for violence—and the United States took the position that, absent a specific request, a prosecutor never had a duty to disclose material evidence favorable to the accused. *See* Brief for Petitioner at 24-33, *United States v. Agurs*.

The Court rejected this extreme position and announced three levels of scrutiny. First, in the absence of a specific request for the material at issue,

the duty to disclose depends on the material's character. If the undisclosed evidence "demonstrates that the prosecution's case included perjured testimony and the prosection knew, or should have known of the perjury," the defendant is entitled to a new trial if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* at 103. Even if no perjured testimony is involved, a new trial is nonetheless required if the undisclosed evidence "is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce." *Id.* at 112. Finally, if a specific request has been made, "if the subject matter of such a request is material, *or indeed if a substantial basis for claiming materiality exists*, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge." *Id.* at 106 (emphasis supplied).

Agurs was not a specific-request case, so the quoted language discussing the standard applicable to such cases may be characterized as dicta. However, the Court inserted that language in an opinion in a case in which the government argued for a much more radical rule, and the opinion of the Court did not question Justice Marshall's statement that the Court had held "that the prosecutor's constitutional duty to provide exculpatory evidence to the defense is not limited to cases in which the defense makes a request for such evidence." *Id.* at 114 (Marshall, J., dissenting). Thus this court was justified in applying the "substantial basis for claiming materiality" test in *United States v. McCrane*, 547 F.2d 204, 207 (3d Cir. 1976), and *United States v. Higgs*, 713 F.2d 39, 43 (3d Cir. 1983), *cert. denied sub nom. Kemp v. United States*, 104 S. Ct. 725 (1984).

Our major difficulty with the *Agurs* formulation of the governing rules applicable in cases in which

specific requests were made arose from the application of Justice Stevens' "substantial basis for claiming materiality" standard. As I noted in our earlier opinion, the formulation inevitably tends to encourage nondisclosure, even of specifically-requested materials, by prosecutors hoping to succeed in post-trial litigation over materiality. *See Oxman*, 740 F.2d at 1310; *see also United States v. Starusko*, 729 F.2d 256, 262-63 (3d Cir. 1984).

In our first opinion we attempted to give some workable content to the "substantial basis for claiming materiality" test for disclosure in the post-verdict context. The task was complex for several reasons. First, because the undisclosed information is unknown to defense counsel until after trial, the court ruling on a new trial motion inevitably has to speculate as to whether disclosure of the material would have led to the discovery of other relevant information and as to how defense counsel would have used it at trial. Second, the court also has to speculate as to how appropriate use of the material at trial would have affected the factfinder's deliberations.

In such circumstances, as with all matters involving inference or speculation, allocation of the risk of nonpersuasion will usually be dispositive. We understood *Agurs* to have dealt with the allocation of this risk by establishing a threshold legal standard for materiality in specific-request cases — "substantial basis for claiming materiality" — that, when met, placed the burden upon the prosecution of satisfying the court that the error was harmless beyond a reasonable doubt. *See Oxman*, 740 F.2d at 1313 (citing *Chapman v. California*, 386 U.S. 18, 24 (1969), which recognized that the government carried the risk of nonpersuasion in this context). Thus we held that as a matter of law "the impeachment of an incriminating witness with significant evidence attacking the

truthfulness of his testimony 'might affect' the jury's assessment of reasonable doubt and thereby affect the outcome of the trial." *Id.* We also held that the government failed to satisfy the *Chapman* harmless error test. *See id.* at 1317-19.

The dissent to our original opinion would have collapsed the inquiry into materiality and the *Chapman* burden of establishing harmless error in specific-request cases into a single test of whether the evidence "might have" affected the jury's verdict. *See id.* at 1321-22 (Sloviter, J., dissenting). The dissent apparently would have placed the risk of nonpersuasion on the "might have affected the verdict" issue upon the defendant. The majority observed that this approach "confuses the prospective *Brady* analysis which the prosecutor must apply before trial with the constitutionally harmless error determination which must be made after trial." *Id.* at 1314.

B.

We must now discern what the Supreme Court has wrought in *Bagley*. Justice Blackmun speaks for a majority of the Court in Parts I and II of the *Bagley* opinion.

Part I merely recites the prior history of the case, but in the second part Justice Blackmun addresses the Court of Appeals' decision concerning the prosecutor's refusal to disclose to a defendant allegedly exculpatory material. The Court of Appeals for the Ninth Circuit, relying on *Davis v. Alaska*, 415 U.S. 308, 318 (1974), had held that the prosecutor's withholding of specifically-requested impeachment evidence could never satisfy the harmless error standard and thus required an automatic reversal. *See Bagley v. Lumpkin*, 719 F.2d 1462, 1464 (9th Cir. 1983), *rev'd and remanded sub nom. United States v. Bagley*, 105 S. Ct. 3375 (1985). That court's theory was that the

withheld information deprived the defendant of a constitutionally protected right of cross-examination. *See id.*

Justice Blackmun rejected that theory, holding that impeachment evidence and exculpatory evidence stand on the same level, constitutionally. *See Bagley*, 105 S. Ct. at 3377-79. In other words Justice Blackmun concluded that nondisclosure of either is subject to a harmless error analysis.[4]

Having rejected the Ninth Circuit rule that impeachment evidence was entitled to a higher degree of constitutional protection than exculpatory evidence, Justice Blackmun turned in Part III of *Bagley* to "the standard of materiality applicable to the nondisclosed evidence at issue." *Bagley*, 105 S. Ct. at 3381-82. Although only Justice O'Connor joined that part of the opinion, Justice White, with whom the Chief Justice and Justice Rehnquist joined, approved of Justice Blackmun's formulation of the standard of materiality of specifically-requested and withheld evidence. *See id.* at 3385 (White, J., concurring in part and concurring in the judgment). That formula is whether there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 3384; *id* at 3385 (White, J., concurring in part and concurring in the judgment). Justice Blackmun and Justice O'Connor opined further that under this formulation

> the reviewing court may consider directly any adverse effect that the prosecutor's failure to

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4. Since this court has never indicated otherwise, and indeed in our prior opinion said expressly that nondisclosure may be excused if the government carries the burden of showing beyond a reasonable doubt that the error was harmless, nothing in Part II of the *Bagley* opinion affects this case or extant Third Circuit caselaw on the prosecutor's duty to disclose.

> respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.

Id. at 3384. The judgment of the Court, in which Justice White, the Chief Justice, and Justice Rehnquist join, "remand[s] the case to [the Court of Appeals] for a determination whether there is a reasonable probability that, had the inducement offered by the Government to [witnesses] been disclosed to the defense, the result of the trial would have been different." *Id.* at 3385.

The significance of five Justices joining in this judgment lies in the fact that all five agreed that the materiality determination shall be made, as Justice Blackmun put it, by "the reviewing court," not by the court of first instance.[5] While in making this determination we may take into account the trial court's appraisal of the record, *Bagley* makes clear that the ultimate responsibility lies here.

Thus what the majority of the Supreme Court appears to have done in *Bagley* is to merge the standard of materiality, which must of course guide prosecutors in responding to requests for information and courts in pretrial rulings on requests, into the standard of review, which under *Agurs* was whether,

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5. The dissenting judges, *a fortiori*, support the proposition that the determination must be made by the reviewing court. That allocation of decisional responsibility is consistent with *Chapman v. California*, 386 U.S. 18, 24 (1967).

assuming materiality as a matter of law, the error was harmless beyond a reasonable doubt. *See id.* at 3392-93 (Marshall, J., dissenting); *id.* at 3400 (Stevens, J., dissenting). Moreover, the "reasonable probability" standard of review is more favorable to the government than the "beyond a resonable doubt" standard of *Chapman*.

But, while it is clear that the assessment of the effect of the withholding of requested material still is to be made by the reviewing court and that the test for such review is no longer whether it is "able to declare a belief that it was harmless beyond a reasonable doubt," *Chapman*, 386 U.S. at 24, the several opinions in *Bagley* are silent as to the appropriate allocation of the risk of nonpersuasion. This is significant, for the extant rule was clear:

> Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it the burden to show that it was harmless. It is for that reason that the original common-law harmless error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.

Id.; *see Oxman*, 740 F.2d at 1313-19.

Allocation of the risk of nonpersuasion is critical, for the *Bagley* "reasonable probability" standard, as a standard for review is hardly self-explanatory. In *Chapman* the Court wrote,

> There is little, if any difference between our statement in *Fahy v. Connecticut* [375 U.S. 85, 86-87 (1963)] about "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and requiring the beneficiary of a

> constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

386 U.S. at 24. If there is little if any difference for purposes of review between "reasonable possibility" and "beyond a reasonable" doubt, there is hardly less between "reasonable probability" and "beyond a reasonable" doubt. In all cases where such formulae are used as standards for review, the outcome will usually turn upon which party must bear those risks inherent in speculation as to what may have gone on in the decisional process had the script been presented to the factfinder differently.

Mindful that in specific-request cases the prosecutor, acting *ex parte*, makes the materiality determination in the first instance, and thus creates the problem, I cannot read from the Justices' silence an intent to change the settled law, which required that the government satisfy the reviewing court that, had the prosecutor disclosed the evidence before trial, the trial's outcome would not have been different. It is true that in cases concerning prosecutors' failure to disclose possible exculpatory materials we need no longer be convinced beyond a reasonable doubt that the outcome would have been the same, but we must still be persuaded by the government that no other outcome was reasonably likely. The party that created the problem still bears the risk of nonpersuasion.

C.

Exercising the independent judgment that *Bagley* still requires, I am not satisfied that there is no reasonable probability that, had disclosure been made in this case, the outcome would have been the same. As I noted in our prior opinion, the evidence of Pflaumer's involvement was less than overwhelming. *See Oxman*, 740 F.2d at 1315-16; 1317-18. Judge Sloviter notes that

the jury was presented with substantial evidence of his guilt. *See* Typescript 16. The fact remains, however, that Pflaumer also presented a defense. The gist of that defense was that the scheme to defraud was that of Gillan, the President of WHP, and that Frank Jock, his principal accuser, falsely implicated Pflaumer to secure Jock's release from prison. To bolster Jock's perhaps doubtful credibility, Pflaumer argued, the government then bargained for additional supporting testimony. And in light of the revelation that Luciano, a witness supporting Jock's implication of Pflaumer, also received lenient treatment in exchange for testimony, Pflaumer's theory was clearly plausible. Had it been revealed that Ralph Wille, another witness who testified against Pflaumer, also received immunity, the theory would have been still more credible. The jury would then have noticed that *every* witness inculpating Pflaumer in any significant way had purchased lenient treatment.

Pflaumer's vigorous impeachment of Jock, moreover, invited the jury to seek corroboration of Jock's testimony from other witnesses. Wille, who testified that Pflaumer exerted day-to-day control over the afairs of WHP, provided the most significant corroboration, as his testimony afforded the jury a basis for inferring that Pflaumer must have known of the mail fraud scheme. Impeachment of Wille could well have undermined the jurors' confidence in such an inference.

Judge Sloviter relies upon the fact that Wille received only a grant of use immunity, rather than the direct benefits received by Jock and Luciano. *See* Typescript 17. Mindful of Justice Blackmun's admonition that the reviewing court assess the possibility that prejudice to the presentation of the defendant's case "might have occurred in light of the totality of the circumstances and with an awareness of

the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response." *Bagley*, 105 S. Ct. at 3384. I attach little significance to that distinction. Clearly, defense counsel would have argued to the jury that the greatest benefit the government had at its disposal was immunity from prosecution.

Thus I conclude that the difference between the *Chapman* harmless beyond a reasonable doubt standard and the *Bagley* reasonable probability of changing the outcome standard does not in this instance require a different result. The government has not persuaded me that, had it not withheld the information impeaching its only significant unimpeached witness, the outcome would with reasonable probability have been the same.

III.

Since it is likely that the Supreme Court will be given another opportunity to consider this case, it seems appropriate to suggest that from the perspective of a judge obliged to exercise the review function announced in *Bagley* the majority has created a monstrosity.

In the first place elimination of any distinction between the standard of materiality and the standard of review will have the inevitable effect of encouraging the prosecutorial misconduct of which this court has so long complained. *See, e.g., United States v. Starusko*, 729 F.2d 256, 262-63 (3d Cir. 1984); *United States v. Kaplan*, 554 F.2d 577, 581 (3d Cir. 1977). The highest court has now instructed prosecutors to decide for themselves whether nondisclosure of requested information will produce a reasonable probability of a

different result. It has, moreover, at the review stage, lessened the burden that they formerly bore of satisfying us beyond a reasonable doubt that such nondisclosure did not alter the outcome of the trial. This has reduced the risk of nondisclosure in three ways.

First, as we indicated in *Starusko*, such self-help by government attorneys is inconsistent with the Model Rules of Professional Conduct and should be referred to the attention of the appropriate disciplinary authorities. *See Starusko*, 729 F.2d at 264. Given the standard of materiality announced in *Bagley*, our disciplinary tiger is obviously toothless, for all prosecutors can plausibly urge in a disciplinary proceeding that they acted in the belief that the requested information would not produce a reasonable probability of a different result.

Further, the watered-down standard of materiality, by encouraging prosecutors to make their own determinations on the disclosure of information, will inevitably move the judicial resolution of disputes over discovery in criminal cases from the pretrial stage, where they properly should be resolved, to the post-trial stage where their resolution will always be far more difficult.

And finally, by presenting the hard-pressed judges of the courts of appeal with still another standard of review without disclosing to us in some comprehensible manner how the new standard really differs from the old, the Court has compounded our difficulties. The differences between the majority and dissent as to the application of *Bagley* in this case are illustrative, but they are only the beginning. We had almost two decades of experience in applying the *Chapman* standard, and only rarely, in my experience, did it produce differences in opinion among us as to

which errors required a new trial. The *Bagley* standard seems designed to produce such differences and thereby to increase the burden of opinion writing.

In short, whatever other concerns motivated the Court's majority in *Bagley*, problems of judicial administration of the criminal justice system as a whole seem to have been entirely ignored.

IV.

Because the jury instruction error affected both the conspiracy and the multi-party scheme to defraud aspects of the case, a new trial on all counts is required. Because the impeaching information about Wille, withheld despite a specific request by the defendant, was on this record information that if disclosed would have presented a reasonable probability that the result would have been different, a new trial is required. I would order a new trial on all counts.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1532

UNITED STATES OF AMERICA

v.

WILLIAM H. PFLAUMER,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal No. 83-00113-01)

Before: GIBBONS and SLOVITER, *Circuit Judges*
and MENCER, *District Judge*•

ORDER AMENDING OPINION

It is ORDERED that the slip opinion in the above case, filed October 9, 1985, be amended as follows:

At page 6 of the slip opinion, lines 6-7, substitute:

> a reasonable probability that the result of Pflaumer's trial would have been different.

for "a reasonable probability that Pflaumer would have been acquitted."

• Hon. Glenn E. Mencer, United States District Court for the Western District of Pennsylvania, sitting by designation.

At page 13 of the slip opinion, line 7, delete the words "or whether it," insert a period after "1671" and insert thereafter:

> In *Bagley*, the Court stated that this inquiry is insufficient "because it does not indicate what quantum of likelihood there must be that the undisclosed evidence would have affected the outcome." 53 U.S.L.W. at 5087, n.12. Here, however, the district court then proceeded to decide whether the evidence

By the Court,

/s/ Dolores K. Sloviter

Circuit Judge

Dated: November 4, 1985

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-1532

UNITED STATES OF AMERICA

v.

WILLIAM H. PFLAUMER,

Appellant

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, *Circuit Judges,* and MENCER, *District Judge*[*]

The petition for rehearing filed by

Appellant, WILLIAM H. PFLAUMER in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Gibbons would grant rehearing.

By the Court,

/s/ Delores K. Sloviter

Judge

Dated: November 4, 1985

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1. * Hon. Glenn E. Mencer, United States District Court for the Western District of Pennsylvania, sitting by designation.